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IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

**CONTINENTAL AND COMMERCIAL TRUST &
SAVINGS BANK, a corporation, and FRANK
H. JONES, Trustees, Appellants,**

vs.

**COREY BROTHERS CONSTRUCTION COM-
PANY, a corporation, and UNION PORTLAND
CEMENT COMPANY, a corporation, Appellees.**

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

BRIEF OF APPELLANTS.

**MAYER, MEYER, AUSTRIAN & PLATT,
AMOS C. MILLER, ESQ.,**

Chicago, Illinois,

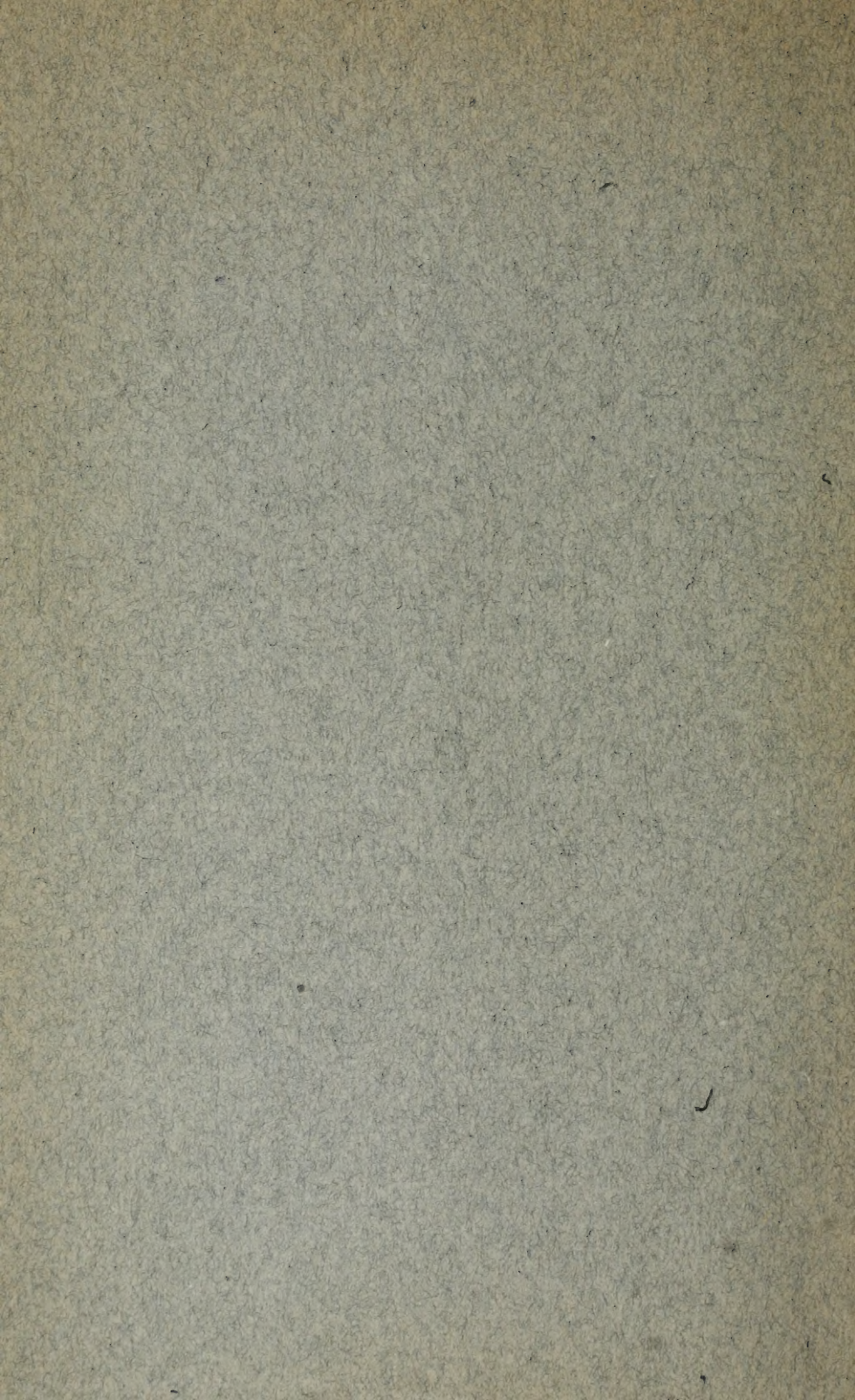
RICHARDS & HAGA,

Boise, Idaho,

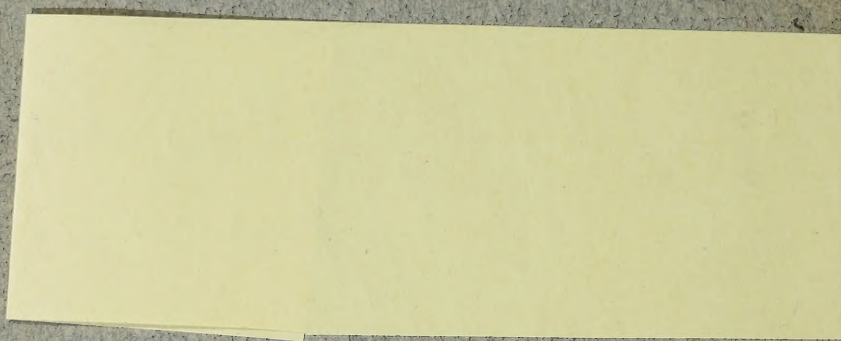
Solicitors for Appellants.

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Records of U.S. Circuit
Court of appeals
816



NO. 2264

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STATEMENT OF THE CASE.

This is an appeal by the trustees under two trust deeds securing two mortgages upon the Big Lost River Irrigation System located in Idaho, from a decree of the District Court for the District of Idaho establishing a mechanic's lien in favor of Corey Brothers Construction Company and the Union Portland Cement Company and directing that a sale be made, without redemption, to satisfy such liens unless the Irrigation Company should pay the amount of such liens within five days. This appeal is taken on behalf of the holders of the outstanding bonds

secured by said trust deeds, about \$1,380,000 in amount, the lien of which is held by the District Court to be subject to the mechanic's liens aforesaid. A brief statement of the case, and of the points involved on this appeal is as follows:

The Big Lost River Irrigation Company is an Idaho corporation, chartered June 15, 1909. Shortly before that date its incorporators made a verbal agreement with Corey Brothers Construction Company, a corporation of Utah, to construct the irrigation system in question, consisting of a dam, canals, laterals, etc. A written contract, complete in all respects and details, with the exception of the signatures of the parties, the Irrigation Company and the Construction Company, was drawn up and delivered at that time. Its actual execution by writing in the names of the officers who acted for the two corporations in executing the document occurred on August 26th following. This written agreement is plaintiff's Exhibit 23. It was complete, including the typewritten names of the signers, at the time the verbal agreement was made; the subsequent signing of the officers merely constituted better evidence of the terms of the agreement. This agreement was recognized and ratified by the Irrigation Company from the time of its incorporation, and from that time payments were made by the Irrigation Company to the Corey Brothers Company for work done under the contract.

The irrigation system in question is what is known as a "Carey Act project", constructed under a contract entered into by the State of Idaho with one George S. Speer, dated May 27, 1909 (Rec. 457), all rights under which contract were subsequently, with the consent of the State,

transferred by Speer to the Irrigation Company upon the organization of the latter. This contract was made pursuant to the statute of Idaho (Revised Code, Secs. 1613 to 1634 inclusive), accepting and providing for operations under the so-called "Carey Act" of Congress.

A trust deed covering all the property of the Irrigation Company to secure a \$2,000,000 issue of bonds bearing date July 1, 1909, was executed under date of July 1, 1909, acknowledged August 27, 1909, and filed for record September 3, 1909. Subsequently, on January 1, 1910, another trust deed conveying the same property and securing an additional bond issue of \$400,000 was executed and placed on record. These appellants are named as trustees in both trust deeds. The bonds secured by the trust deeds were delivered by the Irrigation Company to Trowbridge & Niver, a bond house of Chicago, who sold the bonds, and it was out of these sales Corey Brothers Construction Company was paid all of the sum of \$691,119.48, which it received on account of its work done under the aforesaid contract (Rec. 355).

Corey Brothers Construction Company began work under this contract (then verbal) about June 15, 1909, that being the date on which the Irrigation Company was chartered. It continued working upon the contract until August 15, 1910, at which time the State of Idaho, through its State Land Board, had ordered work to cease upon the dam, and that no further sale of water rights be made, because, owing to faults in its construction, consequent on departures from the contract with the State, the dam was considered dangerous to life and property; and before that time also the Irrigation Company had ceased making

payments to the Construction Company upon the estimates of the engineers, the Arnold Company.

Practically all the payments made to the Construction Company were made by Trowbridge & Niver as fiscal agents of the Irrigation Company. The engineering work upon the project was done by the Arnold Company, a corporation, of Chicago, who also made the estimates upon which payments were made to the Construction Company.

Corey Brothers Construction Company did not comply with the laws of Idaho relative to foreign corporations, or secure its license to do business in that State until August 5, 1909, nearly two months after it entered into the contract on which suit is brought, and began the execution of it in Idaho.

It is conceded that the dam is a failure because it leaks to such an extent that to attempt to impound in the reservoir the head of water designed (110 feet), or any useful quantity of water, would endanger the stability of the dam and become an imminent menace to life and property. As a result of this condition of the dam the State of Idaho on July 15, 1910, after a full and careful examination by a Board of Engineers, stopped all further work upon the dam and inhibited all further sale of water rights by the Irrigation Company, thereby, of course, putting an end to all further sale of securities based upon the irrigation system, and thus depriving the Irrigation Company of all right to collect on water rights already sold, and all means with which to pay for further construction work. It is our contention that this failure of the dam was due to the fault of Corey Brothers Construction Company in failing to observe its contract with the Irrigation Company.

This contract, dated August 26, 1909, but actually entered into about June 15, 1909, had attached to it as a part of it, detailed specifications for the construction of the dam as well as the canal system. These same specifications, word for word, were a part of the contract of May 27, 1909, between the State of Idaho and George S. Speer, subsequently transferred by Speer to the Irrigation Company. The State of Idaho stopped the work upon the dam because it had determined through its engineers that the construction of the dam was in violation of these specifications, which were a part both of the contract between the Irrigation Company and the State, and of the contract between the Irrigation Company and the Construction Company. This determination by the State of Idaho, then, was equivalent to a determination that the Construction Company had violated its contract with the Irrigation Company in the construction of the dam. The evidence is clear and undisputed that the faults in the construction of the dam are such that they cannot be corrected except at an expense which would be prohibitive. In other words, it would be cheaper to rebuild the dam or reconstruct it on some other plan; and the expense of so doing would approximate the expense of constructing this dam according to the original plans from the beginning.

Our first defense, therefore, to this action to foreclose mechanic's liens, is that the plaintiff did not comply with its contract and that the deviations were of so serious a character as to make the result a materially different result from that contemplated by the contract between the parties. It is not denied that the Construction Company, by filing its claim for lien in the office of the Recorder of Deeds for the various counties where the works are sit-

uated, took the proper formal steps to establish a lien, if it is entitled to one.

Under the laws of Idaho a foreign corporation, before becoming entitled to do business within the State, must apply for and secure a license to do business therein, filing a copy of its charter, paying the necessary fees and appointing an agent for the acceptance of service. This was done by the Construction Company August 5, 1909, a little less than two months after it entered into the contract in question and began its execution in Idaho. Under the statute of Idaho as construed by the Supreme Court of that State, such a contract is not void, for the non-complying corporation may be sued upon it by the other party to it. Such a contract, however, is unenforcible by the corporation; and the non-complying foreign corporation is by the laws of Idaho denied the status of a corporation. For this reason, also, we claim that this suit should fail.

This action by Corey Brothers Construction Company to foreclose this lien was begun in the District Court of Idaho on October 15, 1910. The Irrigation Company and these trustees were made defendants. One week later, October 22, 1910, the Union Portland Cement Company filed suit in the same court to foreclose its lien, making the same parties defendant. Afterwards Corey Brothers Construction Company amended its complaint, making defendants the Union Portland Cement Company, a Utah corporation, and several other lien claimants, also, like the plaintiff and the Cement Company, citizens of Utah. In the January following, 1911, before the new defendants had pleaded, the Court, on the motion of Corey Brothers Construction

Company, dismissed the action as against the Cement Company and the other residents of Utah. On May 29th following the Court appointed a receiver of all the property of the Irrigation Company. Thereafter, in January, 1912, the Union Portland Cement Company filed in this suit its petition in intervention, asking for a foreclosure of its lien. The record shows that there are other lien claimants who have taken steps to perfect their liens and filed suit thereon in the State court of Idaho, who are not parties to this suit, although under the Idaho statute they are indispensable parties to a suit by another lien claimant to foreclose a lien upon the same property. (See answer of Hansen Bros. et al). These indispensable but absent parties are citizens of Utah, the same as the Construction Company, complainant, and the Union Portland Cement Company, intervenor. Were they present in this suit as parties their presence would oust the court of jurisdiction, because their interests (being claims for liens upon the same property sought by the plaintiff to be subjected to a first lien) are necessarily opposed to that of the plaintiff. Though there is no plea of nonjoinder of indispensable parties, the record shows their existence. Their presence would oust the court of jurisdiction. This was the state of the record also at the time the receiver was appointed; and the Court, therefore, at that time lacked the power either to determine the cause or to appoint a receiver.

It is our contention further that an irrigation system constructed under the Act of Congress known as the "Carey Act", being Section 4 of the Act approved August 4, 1894, as amended by the Act of June 11, 1896, Section 1; and of March 3, 1901, Section 3; and under Sections

1613 to 1634, inclusive, of the Revised Codes of Idaho, is not subject to a mechanic's lien under the statutes of Idaho relating to liens.

It is shown, we contend, by a preponderance of the evidence (though denied by Corey, the President of Corey Brothers Construction Company) that when he entered into the contract with the Irrigation Company, evidenced by Plaintiff's Exhibit 23, he knew it was the intention of the Company to at once place upon the property of the Company a trust deed securing a bond issue, which bonds were to be sold to provide the money to pay the Construction Company for its work under the contract. All of the money received by Corey Brothers Construction Company consisted of the proceeds of the sale of those bonds to these bondholders represented by the Trustees. We claim it would be inequitable to allow the Corey Brothers Construction Company a priority of lien over these bondholders whose money, given in payment for the bonds, has already gone into the pocket of Corey Brothers Construction Company; and that, therefore, the Construction Company is estopped to claim a priority over the bondholders.

The decree of the district court in this case contains certain provisions, which we contend are erroneous, even if the plaintiff is entitled to a decree foreclosing his lien. They are as follows:

First. The decree recites, among the rights of the Irrigation Company which are directed to be sold for the payment of the liens, all lands mentioned in Segregation List No. 8; all lands mentioned in Segregation List No. 18 and all rights in State Desert Land List No. 31. (Rec. 672). The Irrigation Company has not and never had rights in

those lands, except a lien thereon for the payment of the balance of purchase price for water rights. The greater portion of those water rights have been sold by the Irrigation Company. Those contracts under which the Irrigation Company is to receive pay for water furnished have been deposited with these Trustees to secure the payment of the bond issue. Payments to be made upon these water contracts constitute the Irrigation Company's only source of income. It will scarcely be contended (and was not contended in the court below) that these contracts should be sold for the payment of plaintiff's lien. The Irrigation Company has no interest in the lands mentioned in said Segregation Lists which is subject to sale, unless it be those water contracts; and the decree should not contain language which might be construed as authorizing the sale of those contracts.

Second. The decree provides for a sale without redemption, contrary to the statutes of Idaho.

Third. The decree provides for a sale of the construction contract between the State of Idaho and the Irrigation Company, dated May 27, 1909.

Fourth. The decree provides for a sale of the water rights and interests in the irrigation system, previously sold by the Irrigation Company to settlers, and the latter are not parties to the suit, and the payments due under the sale contracts have been assigned to and pledged with these appellants as additional security for the bond issue.

SPECIFICATIONS OF ERRORS RELIED ON.

The errors relied upon by appellants are set forth in detail in the Assignment of Errors (see Record, p. 681-690). Stated generally, they are:

First. The Court erred in decreeing a lien in favor of Corey Brothers Construction Company, because the record shows that said Construction Company in constructing the dam and irrigation works so far departed from its contract with the Big Lost River Irrigation Company as to render the dam practically worthless and the irrigation system unfitted for the purpose for which it was intended to be constructed.

Second. The plaintiff, Corey Brothers Construction Company, a Utah corporation, having entered into the contract upon which the suit is based and having entered upon the execution of the contract in Idaho before securing a license to do business within the State of Idaho, is in no position to bring suit to enforce a lien based upon that contract.

Third. Because the Court is without jurisdiction, for the record shows the existence of indispensable parties to this suit to foreclose a lien upon this property, which parties are not before the Court and were not before the Court at the time of the appointment of the receiver, having been theretofore wrongfully dismissed on plaintiff's motion.

Fourth. The plaintiff, Corey Brothers Construction Company, having known when it entered into its contract to construct this irrigation system, that its pay for work done thereunder must come from the proceeds of bonds sold to the bondholders represented by these Trustees, and having received nearly seven hundred thousand dollars from these bondholders, are estopped from claiming a priority of lien over such bondholders, who purchased without knowledge of plaintiff's lien.

Fifth. This irrigation system and works are not subject to a lien under the Mechanics' Lien Statute of Idaho.

Sixth. The District Court erred in decreeing a sale of the assets of the Big Lost River Irrigation Company without the right of redemption.

Seventh. The District Court erred in directing that there be sold to pay the lien of the complainant all lands mentioned in Segregation List No. 8 and all lands mentioned in Segregation List No. 18 and all right, title and interest in and to Idaho State Desert Land List No. 31; and in not specifically exempting from the foreclosure sale all contracts between settlers upon the lands irrigated and to be irrigated by the Big Lost River Irrigation Company's works, and said Big Lost River Irrigation Company, and all sums still due upon said contracts.

Eighth. The Court erred in decreeing a sale of the contract between the State of Idaho and the Big Lost River Irrigation Company.

Ninth. The Court erred in not saving and reserving from the sale ordered to be made, the undivided and proportionate interests in the irrigation system and water rights previously sold by the Big Lost River Irrigation Company to settlers and entrymen under the project, which settlers and entrymen were not before the Court, but were indispensable parties to a suit for the enforcement of the lien against their rights and interests in such irrigation system and water rights, and their respective mortgages (settlers' contracts) on their respective individual and proportionate interests in said system and water rights had been assigned to and pledged with appellant's trustees, as security for the bond issue.

BRIEF OF ARGUMENT.

First. Plaintiff, without authority, so far departed from the terms of the contract as to make the dam a useless structure and resulted in the condemnation by the State.

(a) The provision of the contract that no change or deviation from the terms of the contract shall be permitted by the engineer, except in writing, is valid and enforceable.

Carter vs. Root, (Neb.), 121 Northwestern, 952.

Langley vs. Rouss, 185 N. Y. 201.

Kelly vs. St. Michael's Roman Catholic Church, decided by N. Y. App. Div. Jan. 1912, reported at page 767 of May 11 issue of Law Reports and Session Laws.

Molloy vs. Village of Briar Cliff Manor, 145 App. Div. (N. Y.) 483.

Bannon vs. Jackson, 117 Southwestern (Tenn.), 504.

White vs. San Raphael R. R. Co. 58 Cal., 417.

Mishoud vs. McGregor, 61 Minn., 198.

Howard vs. Pensacola R. R. Co. 24 Fla., 560.

(b) Drummond, the engineer, had no implied authority from his principal to consent to a departure from the contract for the sole benefit of the contractor.

United States vs. Walsh, 115 Fed. 701, (Court of Appeals, 2nd Circuit).

Town of Sterling vs. Hurd, 98 Pac. 177, (Colo. 1908).

Ryan vs. Reservoir Co. 104 Pac., 221, (Utah, 1909).

(c) The payment of the monthly estimate by the Irrigation Company did not constitute an acquiescence in the departures by Corey Brothers from the terms of the contract.

Mercantile Trust Co. vs. Hensey, 205 U. S. 298.

Hartupee vs. Pittsburgh, 97 Pa. St. 107.

Tharsis Sulphur and Copper Co. vs. McElroy, L. R. Eng. 3 App. Cas. 1040.

United States vs. Walsh, 115 Fed. 701 (Court of Appeals, Second Circuit).

Town of Sterling vs. Hurd, 98 Pac. 177 (Colo. 1908).

Ryan vs. Reservoir Co. 104 Pac. 221 (Utah, 1909).

(d) The departures shown in this case were material and of a character as to defeat the lien.

Elliot vs. Caldwell, 43 Minn. 357.

Spence vs. Ham, 163 N. Y. 230.

Fox vs. Davidson, 36 N. Y. App. Div. 159.

Glacius vs. Black, 50 N. Y. 145.

Anderson vs. Peterert, 86 Hun. (N. Y.) 600.

Bloom, Mechanic's Liens, Sec. 342 and 343.

Perry vs. Quackenbush, 38 Pac. 740.

Schmidt vs. City of North Yakima, 40 Pac. 790.

Leeds vs. Little, 42 Minn. 414; 44 N. W. 309.

W. Va. Bldg. Co. vs. Saucer, 45 W. Va. 483; 31 S. E. 965.

Phillips vs. Gallant, 62 N. Y. 256.

Smith vs. Ruggiero, (N. Y.) 65 N. Y. S. 89.

Hawkee vs. Arundel Realty Co. 98 Minn. 219; 108 N. W. 842.

(e) The bond owners, represented by the trustees, may defend on the ground that the complainant failed to perform its contract to construct the dam.

Eastmore vs. Bunkley, 113 Ga. 637.

Carson vs. White, 6 Gill (Md.) 17.

Adams vs. Central City Granite Brick Co. 154 Mich. 448.

Federal Trust Co. vs. Guiques, 76 N. J. Eq. 495.

Brown and Hoff vs. Cornwell, 108 Va. 129.

Knabb's Appeal, 10 Pa. St. 186.

Dunham vs. Woodworth, 158 Ill. App. 486.

Title Guaranty and Trust Co. vs. Burdette, 104 Md. 666.

Adams vs. Central City S. B. & B. Co. (Mich.) 117 N. W. 932.

Dittmer vs. Bath, 117 Mich. 571.

Thomas vs. Turner, 16 Md. 105.

McAdam vs. Bailey, 1 Phil. 297.

See:

34 *Century Dig.* Sec. 450, p. 2634.

Especially is this true where the owner of the Irrigation Company has not accepted the work under the contract, but, on the contrary, has in his answer denied that the complainant observed its contract. (See Answer of Big Lost River Irrigation Company, par. 9, Record page 46).

Second. Complainant entered into this contract and began work under it long before it complied with the foreign corporation laws of the State of Idaho, and it can neither enforce this contract nor obtain a mechanics' lien based thereon in the Federal Court.

(a) The Constitution and Statute of Idaho, as con-

strued by the Idaho Supreme Court, provide that contracts of non-complying foreign corporations are invalid and unenforceable when sued upon by the corporation, although the defendant must plead the objection or he will be deemed to have waived it, and although such contracts can be enforced against the corporation.

Article XI, Sec. 10, Constitution of Idaho.

Section 2792, Revised Codes of Idaho.

Katz vs. Herrick, 12 Idaho 1, 87 Pac. 873, and cases there cited.

Valley Lbr. Co. vs. Driessel, 13 Ida. 662, 93 Pac. 765.

War Eagle Min. Co. vs. Dickie, 14 Ida. 534, 94 Pac. 1034.

Tarr vs. Western Loan & Sav. Co. 15 Ida. 741, 99 Pac. 1049.

(b) The Federal courts will follow the construction of the highest court of a State in regard to the validity or enforceability of such contracts.

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S. 611, 47 L. Ed. 329.

Chattanooga Bldg. & Loan Ass'n. vs. Denson, 189 U. S. 408, 47 L. Ed. 871.

David Lupton's Sons Co. vs. Automobile Club, 225 U. S. 489, 56 L. Ed. 1177.

Cooper Mfg. Co. vs. Ferguson, 113 U. S. 727.

McCanna & Fraser Co. vs. Citizens' Trust Co., 24 C. C. A. 11, 76 Fed. 420.

(c) In numerous cases involving constitutional and statutory provisions similar to or identical with the Idaho

Constitution and Statutes, the Federal Courts have held that contracts of non-complying foreign corporations could not be enforced in the Federal Courts.

Diamond Glue Co. vs. U. S. Glue Co., (Wis.) 103 Fed. 838.

Diamond Glue Co. vs. U. S. Glue Co., (Wis.) 187 U. S. 611, 47 L. Ed. 329.

Chattanooga Bldg. & Loan Ass'n vs. Denson, (Ala.) *supra*.

In re Conecuh Lbr. Co. (Ala.) 180 Fed. 249.

Thomas vs. Birmingham R. R., Light & Power Co., (Ala.) 195 Fed. 340.

McCanna & Fraser vs. Citizens' Trust Co. (Penn.) *supra*.

Pittsburg Construction Co. vs. West Side, etc., Co., (Penn.) 83 C. C. A. 501; 154 Fed. 929.

Colonial Trust Co. vs. Montello Brick Works, (Penn.) 97 C. C. A. 144, 172 Fed. 310.

Buffalo Ref. Machine Co. vs. Penn H. & P. Co., 102 C. C. A. 196, 178 Fed. 696.

Re Comstock (Ore.) 3 Sawy. 218; Fed. Cas. 3078.

Semple vs. Bank of British Columbia (Ore.) 5 Sawy. 88, Fed. Cas. 12659.

Cyclone Min. Co. vs. Baker Light & Power Co. (Ore.) 165 Fed. 996.

La Moine Lbr. Co. vs. Kesterson (Ore.) 171 Fed. 980.

Evansville & Henderson Traction Co. vs. Henderson Bridge Co. (Ky.) 132 Fed. 402.

(d) Complainant cannot enforce in United States Courts a mechanics' lien based solely upon a statute of

Idaho, under circumstances which would forbid such enforcement in the State Courts.

Section 5110, Revised Codes of Idaho.

Philadelphia Fire Ass'n vs. New York, 119 U. S. 110.

Pembina vs. Pennsylvania, 125 U. S. 181.

The Idaho Supreme Court holds that such non-complying foreign corporation has no legal existence within the State, and it cannot be a person within the meaning of the Mechanics' Lien Statute.

Katz vs. Herrick, supra.

The last sentence in Section 2792 of the Revised Codes of Idaho grants to such foreign corporations only as comply with the Idaho law, the rights and privileges of domestic corporations, and a non-complying foreign corporation is not therefore entitled to a mechanic's lien or to the enforcement thereof in either the State or Federal Courts.

Section 2792, Revised Codes of Idaho.

Third. The Court is without jurisdiction because the record shows that there are indispensable parties who are not parties to this record; that they are lien claimants against this same property, basing their rights on this same contract, and that they were wrongfully dismissed out of the case on complainant's motion before the appointment of a receiver. The existence of such indispensable parties, lien claimants, is shown by the answer of Hanson Brothers, et al.

(a) Equity Rules 47 and 48 provide for the dismissal of parties who will oust the court of jurisdiction only in case they are not indispensable parties.

(b) Indispensable parties defined.

United States vs. Allen, 179 Fed. 13.

(c) Under the Idaho statute, proceedings of this character are governed by general equity rules.

Sec. 5124, Idaho Code.

Under such a statute, the Court cannot proceed in the absence of indispensable parties.

Kimball vs. Cook, 1 Gilm. 423.

Williams vs. Chapman, 70 Ill. 423.

Lomax vs. Dore, 45 Ill. 379.

Rall vs. Sullivan, 1 Ill. App. 94.

Under Section 4113 and 5120 of the Idaho Civil Code, all lien claimants are indispensable parties.

Section 4113, *supra*, contains the following:

“But when a complete determination of the controversy cannot be had without the presence of other parties, the Court must then order them to be brought in.”

Section 5120, *supra*, provides that the Court in the judgment must declare the rank of each lien claimed.

See also, as to the necessity of all lien claimants in *Gray vs. Havemeyer*, 53 Fed. 174.

See also *Newton vs. Gage*, 155 Fed. Rep. 598.

The question of lack of jurisdiction may be brought to the Court's attention at any time.

Judiciary Act of March 3, 1875.

Morris vs. Gilmer, 129 U. S. 315-326, (32 L. Ed. 690).

Anderson vs. Bassman, 140 Fed. 10.

Fourth. The complainant is estopped to assert a lien superior to that of the trust deed securing the bond, from

the proceeds of the sale of which complainant has been paid nearly \$700,000.00.

Dickerson vs. Colgrove, 160 U. S. 580; 25 L. Ed. 619.

West vs. Klotz, 37 Ohio St. 420.

McGraw vs. Bayard, 96 Ill. 146.

Bristol Goodson Elec. Lt. Co. vs. Bristol Gas El.

Lt. and Power Co. 39 Penn. 371; 42 S. W. 19.

Com. Bldg. and Loan Assn. vs. Travette, 160 Ill. 390.

Hughes vs. McCasland, 122 Ill. App. 365.

Phillips vs. Gilbert, 2 McArthur (D. C.) 415.

Acker vs. Massman, 12 Ind. App. 696, 41 N. E. 77.

Spargo vs. Nelson, 10 Utah, 274; 37 Pac. 495.

Fifth. The franchises and rights of a *quasi*-public corporation, owing important duties to the public, and the property vested in it necessary for their use and enjoyment and the accomplishment of the purposes for which it was created, constitute an entirety, and in the absence of special statutory authority, are not subject to be seized and sold on execution, or for mechanics' liens.

Chicago & N. W. Ry. Co. vs. Forest County, 95 Wis. 89, 70 N. W. 77.

Chapman Valve Mfg. Co. vs. Oconto Water Co., 89 Wis. 264, 46 Am. St. Rep. 830.

Plymouth Ry. Co. vs. Colwell, 39 Pa. St. 337, 80 Am. Dec. 526.

Guest vs. Lower Marion Water Co., 142 Pa. St. 610, 12 L. R. A. 324.

Buncombe County vs. Tommey, 115 U. S. 122, 29 L. Ed. 305.

Pittsburg Testing Lab. vs. Milwaukee, etc. Co., 110

Wis. 624, 84 Am. St. Rep. 948.

People vs. Herkimer, 4 Cow. 348.

Foster vs. Fowler, 60 Pa. St. 27.

Susquehanna Canal Co. vs. Bonham, 3 W. & S. 27.

Dunn vs. No. Missouri R. R. Co., 24 Mo. 493.

Schulenberg vs. Memphis, etc. Co., 67 Mo. 442

Skranka vs. Rohan, 18 Mo. App. 340.

Ammant vs. New Alexandria & Pittsburg Turnpike, 13 Serg & Rawl, 210.

Elliott on Railroads, (2d Ed.) Sec. 1066.

Thompson on Corporations (2d Ed.) Sec. 3395.

20 Am. & Eng. Ency. of Law (2d Ed.) 296.

Phillips on Mechanics' Liens, Sections 180, 181.

Boisot on Mechanics' Liens, Sections 188, 209.

3 *Dillon, Municipal Corporations* (5th Ed.) Sec. 993.

(a) The terms "buildings, bridges, canals and other structures," used in a mechanics' lien statute, will not be construed to include *public* buildings, or *public* bridges, or *public* canals, or other public structures, or structures, buildings or improvements owned by *quasi*-public corporations and constituting an essential part of the plant or works required by such corporations to accomplish the purposes for which they were created, or to discharge their duties to the public, unless the statute unmistakably shows that such was clearly the intention of the Legislature.

Cases cited *supra*, and

First Nat. Bank vs. Malheur Co. 30 Ore. 420; 33 L. R. A. 141.

Bates vs. Santa Barbara Co., 90 Cal. 543.

Loring vs. Small, 50 Iowa 271, 32 Am. Rep. 136.

Sixth. Under the laws of the State of Idaho a purchaser of a water right from an irrigation company takes the same free and clear of all liens and encumbrances on the system.

Section 3292, Idaho Revised Codes.

Hewitt vs. Great Western Beet Sugar Co. 20 Idaho 235, 118 Pac. 296.

Seventh. Public contracts, in the nature of franchises, not let to the lowest bidder but involving personal confidence and a relation of trust, and coupled with liabilities and financial responsibility, are not assignable without the consent of the contracting parties.

Arkansas Valley Smelting Co. vs. Belden Min. Co.
127 U. S. 379, 32 L. Ed. 246.

Demarest vs. Dunton Lumber Co. 161 Fed. 264.

Boston Ice Co. vs. Potter, 123 Mass. 28, 25 Am. Rep. 9.

Winchester vs. Howard, 97 Mass. 303, 93 Am. Dec. 93.

(a) Contracts with the State of Idaho for the construction of irrigation works under the Carey Act involve financial responsibility and the relation of trust and personal confidence on the part of the contracting companies.

Idaho Revised Codes, Sections 1615, 1621.

Eighth. Under the laws of the State of Idaho, all real property sold at judicial sale is subject to redemption within one year from date of sale.

Sections 4520, 4490 and 4491, Idaho Revised Codes.

Hewitt vs. Walters, 21 Ida. 1, 119 Pac. 705.

Brown vs. Bryan, 6 Ida. 14, 51 Pac. 995.

Phillips vs. Hogart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.

Levy vs. Burkle (Cal.) 14 Pac. 564.

Fitch vs. Weatherbee, 110 Ill. 475.

Locey Cole Mines vs. Chicago W. and V. Cole Co.
131 Ill. 9, 8 L. R. A. 598, 22 N. E. 503.

Hollingsworth vs. Campbell, 28 Minn. 18, 8 N. W. 873.

Rhinehart vs. Stevenson, 23 Ill. 524.

DeWolf vs. Hayden, 24 Ill. 526.

Hall vs. Bond, 74 N. Y. Supp. 5.

McBee vs. McBee, 1 Heisk. (Tenn.) 558.

(a) The right of redemption is a rule of property and must be recognized by the courts of the United States, sitting in equity.

Brine vs. Hartford Fire Ins. Co. 96 U. S. 627; 24 L. Ed. 858.

Parker vs. Dacres, 130 U. S. 43, 32 L. Ed. 848.

Mason vs. Northwestern, Etc. Co. 106 U. S. 163; 27 L. Ed. 129.

Hammock vs. Farmers, Etc. Co. 105 U. S. 74; 26 L. Ed. 1111.

I.

Plaintiff Without Authority So Far Departed From the Terms of the Contract As to Make the Dam a Useless Structure and Resulted In Its Condemnation By the State.

A brief history of this dam is as follows:

Plaintiff Construction Company started this work upon the dam as well as on the canal system about June

15, 1909. At that time and during all the time while plaintiff continued its work, W. H. Rosecrans of the Arnold Company, engineers of this project, was the chief engineer of this construction work. This was conceded by everybody upon the trial. The learned judge of the District Court in his opinion herein reaches a different conclusion, but as we shall show hereafter there was never, prior to the final argument in this case in the District Court, any disagreement on that point; and if, as the learned judge of the District Court pertinently says, the interpretation given a contract by the parties to it while the work under it is in progress, is binding on the Court and upon all parties to the litigation, then we insist it is now too late to substitute another as chief engineer in place of Rosecrans.

From June, 1909, until November, H. G. Raschbacher was in the employ of the Arnold Company as resident engineer in charge of the inspectors both on the dam and the canal system. During that same period Goyne Drummond was under Raschbacher in part charge of the inspection on the canal system and Frank Coy was also under Raschbacher in the same relation to the dam. About November, 1909, Raschbacher was transferred by the Arnold Company to other work and Drummond succeeded him. About the same time Frank Coy, who, up to November, 1909, had been the inspector on the dam, and who had shown a disposition to compel complainant to adhere rather strictly to its contract, and who about that time had a few words with Mr. Corey, complainant's president, growing out of a threat by Coy to stop the work unless the Construction Company corrected a certain defect in the core-wall, *was superseded at the request of Corey.* (Rec. 385, 386-388, 390, 391, 435).

Up to the time Coy left the departures from the contract, so far as they concerned the work upon the dam, were of minor consequence when compared with those which occurred afterwards. After Corey had gotten rid of the obnoxious young engineer Coy, and after Raschbacher had been succeeded by the very friendly Drummond, Corey began a practice upon this dam which, alone and unaided by any other departures from the contract, was sufficient to render the dam a useless structure. This defect and departure from the contract was as follows:

The contract under which the dam was built provided that the material from the borrow pits might be dumped from trestles twenty-five feet high, provided these trestles were two in number only, one in the lower toe and the other in the upper toe of the dam, and both parallel with the core-wall, and provided all dumping should be done from these parallel trestles *toward the* core-wall. Opposing counsel in the court below contended that the contract gave the Construction Company the *privilege* of dumping always toward the core-wall from these trestles; but we submit that under the reading of the *two* paragraphs following the words "forming embankment," contained in the contract and appearing on page 514 of the printed record, the contractor was bound, if he used trestles, to dump always toward the core-wall; and this was the conclusion of the District Court (see Opinion, printed record top of p. 657). Now the Construction Company, instead of following that provision of the contract, built several trestles diagonally crossing the core-wall and about twenty-five feet high, and dumped progressively from those trestles, thus making diagonal fills across and ad-

jacent to the core-wall. The inevitable result of this work was to stratify the material and make a succession of blind drains through the dam from the upper toe to the lower toe, thereby destroying its imperviousness and rendering it fatally unsafe. The evidence is clear and undisputed that this method of construction must destroy the efficiency of the dam.

The style of construction provided by the contract for this dam was that it should contain a concrete core-wall in the center for a distance of about nine hundred feet, then the material from the gravel pits was to be dumped, as above stated, from twenty-five foot trestles, one in each toe of the dam, the dumping being toward the core-wall; then as the fill approached the center the material dumped from the tracks should be wetted or puddled as it was dumped, thus forming an impervious section in the center of the dam, extending its whole length and about sixty feet in width, thirty feet on either side of the core-wall.

An efficient dam must have not only sufficient weight to resist the thrust of the water, but also a sufficiently impervious section either at the upper face or in the center, to prevent percolation under the enormous weight of a filled reservoir (in this instance a depth of 110 feet). Now, the material taken from the borrow pits at this dam was of an ideal composition when properly handled by puddling; in other words, the material was gravel, containing all grades of fineness, from very coarse to powdered dust. The borrow pits were in the cone of Cedar Creek. The material from these pits if replaced in the dam with the exact uniformity with which it lay in the pits (which would, of course, be impossible), would scarcely be sufficiently impervious. If, however, it was dumped from tracks toward

the core-wall and as thus dumped the slope was wetted by a stream of water thrown thereon as the material was dumped, the finer particles would thereby be washed down toward and against the core-wall and the result would be that there would be an excess of fine particles in the section of the dam adjacent to and on either side of the core-wall, thus filling up all voids in the dump and making the center sufficiently impervious to hold water.

On the contrary, if no puddling at all were done, the result of dumping from a twenty-five foot trestle and then continuing to dump from a twenty-five foot fill when the space below the trestle had been filled up, would be that the large, coarse gravel (the coarsest consisting of stones as large as a man's head) would inevitably roll to the bottom of the dump and the finer would linger behind; that would, of course, make a stratified fill; and the stratum at the bottom, which would extend entirely through the dump from the upper to the lower toe, would consist of coarse rocks, forming a perfect drain instead of an impervious dam.

It is quite obvious that if the material should be dumped from a twenty-five foot trestle crossing a core-wall diagonally, it would be quite impossible to do any effective wetting or puddling; for there would be no place from which to take the fine material to be carried against and near to the core-wall. The large, coarse rocks would roll to the bottom and if a stream of water were thrown on that dumped material it would simply wash the fines from a small area adjacent to the core-wall near the top of the fill to another spot adjacent to the core-wall near the bottom of a fill. In other words, wetting or puddling such

a diagonal fill could accomplish nothing more than taking the fines from one place where they were required and putting them in another place where they were required; and still there would be a fatal deficiency in either place. The fine material could not be put into the fill adjacent to the core-wall.

In the borrow pits the material was found to be very uniform, that, is, the coarse and the fines were evenly mingled throughout. To dump from a trestle in the dam would inevitably separate the materials. It therefore became absolutely necessary, in case the contractor elected to use trestles, to so dump the material that that separation could be at least overcome by the puddling; otherwise the material when replaced in the dam, being then stratified instead of uniform, would be very much more pervious than it was as it lay in the borrow pit; and it is quite obvious that to dump this material into the dam from diagonal trestles crossing the core-wall would be to effect a separation and stratification, which could by no possibility be overcome except by the entire removal of the material; which would mean the rebuilding of the dam.

Opposing counsel in the court below, having no testimony whereby to contradict or impeach the testimony of Mr. Storrow and the other engineers who testified on behalf of these defendants, asked the Court to disregard the whole of Storrow's testimony, on the theory that the witness's statement to the effect that the expense of removing the central sixty feet of the dam and replacing the same by proper wetting and puddling would be so expensive as to be impracticable, was obviously and manifestly false. A little reflection will disclose the error of counsel. To remove a section of this dam throughout its whole length

and sixty feet wide at the bottom, would require the removal of a section more than two hundred feet wide at the top, allowing for the natural angle of repose of the material. Nor does this calculation consider the fact that to properly puddle the lower sixty feet in width the wetting must be begun before the fill reaches these sixty-foot lines. Therefore, to do as counsel suggests would be to again handle, not once, but twice, the majority of the material already composing this fill. This dumping from diagonal trestles was solely for the benefit, convenience and financial profit of the contractor and in no way benefited the owner. It came about in this way: Corey built his trestles so light that they would not sustain the weight of a loaded train of cars (see Corey's testimony, Rec. p. 443). There was no necessity for this method of construction, because complainant's chief witness, Drummond, admits that at one point the trestles were built heavy enough (see Rec. p. 148), Corey, therefore, in dumping from trestles made it a practice to dump always from the end car only; and as each car was dumped at the end of the fill the next car was shoved into position and there dumped, and so on until the whole train was dumped; thus always until the trestle was completely filled in, making the dumping at the end of the fill where the latter reached to the top of the trestle. Now, the gravel pits were all upstream from the core-wall. When Corey began to dump below the core-wall, in order to transport his material to that place, he had to cross the core-wall with the trestle. Instead of making the trestle heavy enough to support a loaded train, he built his trestle of light material, thus necessitating filling up underneath the trestle as he pro-

gressed; and thus he made these diagonal fills from trestles across the core-wall. This manifestly was for the benefit of Corey alone. Corey's witness, Drummond, after squirming very hard, finally admits that he did not like to acquiesce in the filling being done from diagonal tracks because he thought the other method was better; but practically says that he acquiesced because it was so much better for Corey (see Rec. p. 178).

The witness on whom the complainant chiefly and almost solely relied to prove the faithfulness with which it observed its contract was Goyne Drummond, who, during the entire progress of this work was in the employ of the Arnold Company, engineers for the Irrigation Company. Drummond is a resident of Wyoming. He went to work for the Arnold Company in the spring of 1909, surveying for this canal system. He was then put on as an inspecting engineer on the canal system under Raschbacher, who was subordinate to Rosecrans, the chief engineer of this work. In November of the same year Raschbacher was transferred and Drummond took his place. About that time Corey had gotten rid of Coy, the young engineer at the dam who had presumed to threaten to stop the work because Corey's foreman refused to follow the obviously proper directions of this young engineer (see Corey's testimony, Rec. 435; and Coy's testimony, Rec. 386-8). Coy had in other respects insisted upon a rather strict compliance by Corey with his contract (see Rec. 386-8). Drummond succeeded Raschbacher about the time that the obnoxious Coy was removed. Then things went differently. Deviations from the terms of the contract which had theretofore been prohibited were freely allowed (see Rec.

385-390). Corey gave Raschbacher a diamond ring (Rec. p. 422). About the time that Drummond was promoted to resident engineer, Corey presented him with some slight tokens of his esteem, such as a shotgun, a Thanksgiving turkey, a box of cigars and a bottle of whiskey, and some other delicacies (Rec. 243). Drummond, on the witness stand, cleared his own skirts to his own entire satisfaction by asserting that he virtuously stipulated with Corey that these courtesies were not to affect his, Drummond's, judgment, to which, of course, Corey agreed! Why he should have thought it necessary to so stipulate he does not explain.

Drummond came to Boise from Wyoming to testify, at Corey's request. For some days he was in daily and hourly communion with the Corey family regarding the case and his testimony (see Rec. p. 243). Drummond's testimony was employed not merely to show how the work was done, but he also qualified and testified in Corey's behalf as an expert in various lines—as an engineering expert, as an expert in land values and as an expert on irrigation schemes.

As a witness he showed much anxiety to do well by the Corey Company. He was asked by the latter's counsel if it was not true that the Corey Company had in all respects complied with its contract and he answered with marked alacrity that it had. On cross-examination he showed that statement to be sadly erroneous. On re-direct examination he was asked if it were not true that all the deviations from the contract were committed for the benefit of the enterprise; and to this delicately suggestive question he gave his equally swift assent. On further cross-examination, however, he was again forced

to retract (see Rec. pp. 185). In his anxiety to be a good witness he was sometimes amusing; he parried questions for several pages relating to the validity of certain blue print maps (see Rec. 171), discovering to his own relief that there was no dynamite concealed in the question, he promptly changed his attitude. At other times for several pages at a time he parried questions which he considered embarrassing (see Rec. 180). He sometimes took several minutes to answer a simple question. As to the dumping from diagonal fills, Drummond, after considerable temporizing, was finally forced to admit that to have followed the contract would have been *"a little better, it is better, there is no question about that; the conditions were such I either had to stop them from work or else allow him to come in in this way"* (Rec. 178). Drummond and one of the Coreys tried to minimize the amount of dumping from diagonal trestles and placed it all the way from a few carloads to a thousand cubic yards. Defendants' witnesses, however, said there were about 2,000 yards in one spot, about 10,000 yards in another and above 40,000 yards altogether dumped from diagonal fills. *But the photographs speak louder than words.* In the face of this no testimony that had amounted to but one thousand or a few thousand cubic yards can be convincing.

The defendants produced as witnesses upon the construction work upon this dam and its effect upon the usefulness of the completed structure, Samuel Storrow, an engineer of large experience in irrigation and dam work, as well as other engineering enterprises, whose residence is in Los Angeles; Paul S. Roberts, an engineer who was State Carey Act Inspector while this work was in pro-

gress, and as a part of his duties in that position watched this dam, and reported the deviations from the contract, which resulted in the action of the State condemning the structure and stopping the work; James A. Green, an engineer of Chicago, with extensive experience in irrigation works in and about Idaho; W. F. Day, an engineer temporarily residing in Idaho; and George H. Binkley, who was at the time the work in question was in progress in the employ of the Arnold Company. All these were engineers of wide experience. Each one of these engineers had examined the dam in question and reached his individual conclusion upon its character without any thought of giving testimony in this case, but for a wholly different purpose; and the testimony of these engineers was sought and produced because of that fact, viz: that they gained their knowledge and reached their conclusions uninfluenced by any employment by any party to a lawsuit. The conclusion of each was that the Corey Company in constructing the dam so far departed from the contract that the dam was rendered useless for the purpose for which it was designed; and we have the admitted fact that the State of Idaho, because of the report of its own engineer (being one of the above witnesses) that the dam in question was so badly constructed as to be a menace to the lives of thousands of people and to valuable property, stopped all work upon the dam. This action too, was taken on the ground that the construction work on the dam vitally departed from the specifications approved by the State Engineer. *And in as much as these specifications were identical with those attached to and made a part of the Corey Company's contract, this finding by the State was a finding that the Corey Company had in vital parts*

departed from its contract with the Irrigation Company.

The testimony upon this point is as follows:

Samuel Storrow (Rec. 247), an engineer of Los Angeles, California, with large experience in the construction of dams, said that he examined this dam very thoroughly in June and July, 1911, his examination of the dam and canal system extending over nearly three weeks; that he found the material dumped from the trestles at various angles toward the core-wall and across the wall from various diagonal tracks, and that the dumping from one of these tracks alone amounted to several thousand cubic yards, and that the angle of these diagonal dumpings varied from forty-five to nearly ninety degrees; that the result was to lay a layer of coarse boulders along the bottom of the dump extending completely under the dam, making a blind drain; that this system of dumping also (not being always toward the core-wall) made a series of drains extending from this bottom blind drain through the body of the fill, thus enabling the water to saturate the whole fill; that this method of construction prevented imperviousness; that he took numerous photographs which were put in evidence, some of which showed the large coarse stones lying directly against and near to the core-wall; that in all places where the core-wall was exposed the material next to it was coarse, full of boulders, either not puddled at all, or puddled so slightly as to leave crevices, the voids near the core-wall being left unfilled; that there was very heavy leakage through the dam; that he found a large amount of material excavated from the tunnel in the cliff at the right end of the dam deposited in the dam and within a very few feet

of the core-wall; that it would be almost impossible to so puddle at that place as to make the fill there impervious; that the joints in the core-wall were not good; that there was sufficient fine material in the borrow pits so that if it had been handled as provided in the contract an impervious bank would have been formed against the core-wall; that the dumping from diagonal trestles crossing the core-wall at angles of from forty-five to ninety degrees made a fill that could not be rendered impervious by any amount of puddling; that the only way that an impervious bank of material against each side of the core-wall could be obtained would be to take the material all out and put it back again and that the expense of that would be prohibitive.

That to go on and complete this dam upon the structure already built to the height originally intended and to attempt to fill that dam with water to the height provided in the contract, would result in the saturation of the dam and percolation of the water through the dam, causing the lower side to slough off, making the angle flatter and flatter until a breach would occur and then the dam would all go out in a very short time.

He said this defect alone, viz., the diagonal fills, was sufficient to render the dam useless (Rec. 250, 254).

He also found that neither the core-wall nor the back filled trench went down to impervious material.

The witness also observed that the puddling was insufficient; that if the puddling has been sufficient the slope of the dumped material would lie, not at its natural angle of repose, but at a flatter angle; this flattening of the angle being caused by the stream of water. In this

dam, however, he found the various fills lying at the natural angle of repose.

The witness further says that the cost of making this dam an effective dam would be but a little less than the cost of building the whole structure upon the naked ground.

The witness also found that the spillway was constructed not as an open cut in the rock cliff, as provided in the plans and specifications, but as tunnels. This made a much less efficient spillway, because its capacity was less when clear and it was much more liable to being filled by debris. This change from the contract was, however, of some benefit to the Irrigation Company, because it lessened the expense.

The witness also found that the Antelope Creek crossing of the Blaine Canal was very different from the plans and specifications, was less efficient in providing against the danger of a flood, was much more likely to cause a wreck of the structure in case of a flood, and that the structure had actually been wrecked by a flood, the wreck being due, as witness believes, to this change from the plans and specifications.

The witness also found various other deviations from the plans and specifications in the construction of the concrete work, headgates, etc., on the canals. For the most of these changes the complainant showed subsequent blue print drawings delivered to him by some of the sub-engineers on the work. In most instances, however, it was not shown that the chief engineer had given his authority for or approval of these changes. It was shown that the changes in several instances lessened the effectiveness of

the structures and in two instances caused their wreck.

This witness made his examination under the employment of a Bondholders' Committee, the purpose and object of the examination being to ascertain whether with a given amount of available money the dam and the other structures could be so completed as to make an efficient system and accomplish the purpose of the enterprise. *On cross-examination he gave it as his opinion that if the plans and specifications has been followed an efficient dam would have resulted* (Rec. 263).

This witness, Storrow, as a part of his examination and tests dug three test pits, one about four feet above the core-wall and 191 feet to the left of the State spillway (this State spillway having been put in by the State subsequent to the time that Corey left the work), one four feet below the core-wall and about 174 feet to the left of the State spillway, and the third one some little distance above the core-wall and seventy-two feet from the State spillway. The imperviousness of this dam was attempted to be shown by complainant by testimony that in the month of June last those three test pits were dry, although the water in the reservoir was *guessed* to be slightly higher than the bottom of those test pits. It was not shown, however, that the hydraulic gradient was higher or as high as the bottom of those test pits. On the contrary, it was shown by the evidence of Storrow that when those pits were dug the water in the reservoir was materially higher than it was in June last (at which time a survey was made by Collins definitely locating the test pits, showing the elevation of their bottoms and the elevation of the water in the reservoir, and furnishing accurate information as to all

those points as against the highly inaccurate guesses of Corey and his witness, Henderson); that at that time when the test pits were dug they were intentionally dug just below the water line; that there was flowing water in them; that during the three weeks that Storrow was on the ground the water lowered and the test pits went dry, although the water in the reservoir was still higher than it was at the time Collins made his plat last June. In other words, the hydraulic gradient is not a straight line from the water level above the dam to the water level below the dam, but varies with the degree of density of the material in the dam; nor were any of these test pits within the lines extending from the reservoir to the stream below the dam. The more pervious the fill, the more steep the drop of the hydraulic gradient (see Storrow's affidavit, Rec. 152).

Opposing counsel in the court below exhibited much feeling toward Mr. Storrow and asked the Court to disregard his testimony—not that there is any substantial testimony in the record to contradict Mr. Storrow, but counsel claims that the witness' testimony bears inherent evidences of unreliability. One such instance we have already referred to and shown the error of counsel. In as much as this same attack upon Mr. Storrow will be made here (there being no other method of disputing his conclusions), we will add a word more in Mr. Storrow's behalf. Counsel claims that Mr. Storrow, having refused to exhibit his report to Mr. Riley, Chairman of the Bondholders' Committee, on the ground that it was a private communication made for a specific purpose unconnected with any issue in this case, that report if exhibited would have

discredited the witness' testimony. It would seem to be a sufficient reply to this charge that counsel for plaintiff, during the cross-examination of Storrow, succeeded in getting possession of a copy of Storrow's report to Mr. Riley, and read from it with more or less accuracy to the witness. That the witness correctly answered as to the contents of the report would seem to be the inevitable conclusion, from the fact that the cross-examining counsel *failed to submit the report to the witness, have it identified and then put it in evidence* (Rec. 349 to 353).

Paul S. Roberts, a civil engineer of seven years experience, who was State of Idaho Carey Act Inspector beginning April, 1910, was charged by the State Engineer with the duty of inspecting the work on this dam and irrigation system and reporting to his superior upon the compliance or non-compliance by the contractor with the provisions of the contract between the State and the Big Lost River Irrigation Company. This contract was first made between the State and Speer and by the latter transferred to the Irrigation Company. The contract referred to Schedule "A," which was said to be a description of the dam, reservoir and irrigation system. No document purporting to be Schedule "A" was attached to the Speer contract as it appears in the office of the State Engineer. It was shown, however, by the testimony of Hale that, under the custom in that office, no Schedule "A" was filed when a contract was made, but when the detailed plans and specifications were subsequently completed to the satisfaction of the State Engineer he put his approval thereon and they then became that part of the contract designated as Schedule "A" (Rec. 233, 244-247, 520). The

specifications filed in this instance subsequent to the Speer contract and as a part thereof were the identical specifications attached to the contract between the Irrigation Company and the Construction Company; therefore, when Roberts, Carey Act Inspector, was investigating and considering the question whether the work upon this dam was in compliance with the Speer contract, afterwards transferred to the Irrigation Company, he was considering the question whether Corey was observing his contract with the Irrigation Company.

Roberts in his work was directed by his superior that as to any work completed during the incumbency of his predecessor he was to make no criticism except in case of clear necessity.

Roberts observed first that the contractor was dumping from trestles crossing diagonally the core-wall. So serious a departure did he consider this that he at once notified the State Engineer (Rec. 268). He also notified the engineer on the dam and requested that the work be discontinued. This work was discontinued for a few days, but subsequently resumed without permission from the State Engineer. Roberts estimated the yardage dumped from such diagonal trestle crossing the core-wall at something above ten thousand yards (Rec. 268). He took many photographs of the dam and other structures to illustrate his report. He found the core-wall leaking (Rec. 269). He found that the dumping from the diagonal trestles resulted in almost perfect separation of the material, the coarser to the bottom, making a very good passage for water. He also found that the puddling was insufficient, not materially affecting the natural angle of repose of the

dumped material. With a head of only a few feet of water in the reservoir, fifty second feet were gong through the dam (Rec. 271).

He found that the concrete that Corey was making, instead of being made from clean gravel taken from the river bed, was made from the gravel as it came from the dump, directly contrary to the specifications on file with the State and the specifications attached to Corey's contract. He found that the concrete foundation of the controlling works for the outlet tunnel was weak and insufficient and not based on rock as it should have been.

He found that under the trestle crossing the dam diagonally, the ground was not plowed as provided in the contract.

He took photographs showing that the coarse rocks from the borrow pits had in dumping rolled down adjacent to the core-wall (Abts. 111; Rec. 481).

He found that the rock excavated from the cliff was put in the body of the dam within twenty-five feet of the core-wall.

It was the opinion of Inspector Roberts that that method of dumping from diagonal trestles and the consequent drain through the dam, made the dam insufficient and unsafe, and he so reported to the State. *As a consequence, the State after a full investigation, stopped the work* (Rec. 271, 416). This was July 15th.

On June 3, 1910, when there was only a few feet of water in the reservoir, *the seepage from the dam amounted to fifty second feet* (Rec. 271). On July 6th, he requested that the dumping from the diagonal fill be stopped. It was resumed on the 14th without permission.

This, of course, was before the State ordered the work to be stopped.

On the 15th day of July, 1910, the State Land Board passed a resolution reciting that the Construction Company was not complying with its specifications in the contract with the State; had failed to comply with the numerous requests to correct the work, *and ordered the work to be stopped and that no further sale of water rights be made* (Rec. 416).

We call the Court's attention to the abstract of Roberts' testimony, both on direct and cross. It shows a careful and conscientious attention to his duties, and a careful consideration of the question of the safety of this dam before recommending that the work be stopped.

George H. Binckley, an engineer of twenty-five years experience, at one time connected with the Arnold Company, but not so connected at the time of his testimony, said (Rec. 344), that in August 5, 1910, when he went to the dam site to close the Arnold Company's offices, he met W. W. Corey; that he inquired of Corey why the water was going through the dam; that Corey explained that some of the excavation from the rock side had been deposited in the dam; that a concrete floor had been built over that to the portal of the tunnel and that the water could pass freely under the floor; also said that the toe wall at the bottom of the concrete facing had not been put in place in the old channel of the river. He further says that at various times he saw five second feet of water passing through the opening of the core-wall; he saw the water coming through the fill about three hundred feet in width above the core-wall; he dug a test pit for Mr. Robinson,

the State Engineer, in the body of the dam; he found the material not well mixed, that there would be a stratum of fine material and then a stratum of coarser material; that the water could flow freely through the stratum of coarse material; *that he saw a trestle built across the core-wall at an angle of about sixty degrees; that, in his opinion, it would be hazardous with the dam constructed in such manner to attempt to impound the full proposed head of water; that the result of such an attempt would probably be that the dam would go out* (Rec. 396). Witness gives it as his opinion that in order to impound the contemplated head of water, it would be necessary to dig a cut-off trench above the upper toe thirty to forty or fifty feet wide and fill it with puddled material such as clay, and very fine material, and then cover the upper facing with concrete or rip-rap; that if you attempted to fill the reservoir to the intended height without so doing, the dam would probably saturate and go out (Rec. 397); that you would have to have a blanket of fine material on the upper facing of the dam above the puddled trench, thirty feet thick at the bottom anyway; *that in his opinion as an engineer, this dam could have been built by strictly following the plans and specifications so as to make an impervious and safe dam to hold the required head of water* (Rec. 397. The word "not" is erroneously inserted in the printed record).

James A. Green, an engineer of Chicago, having in charge a large amount of engineering work in Idaho, examined this Mackay dam in September, 1910, at the request of the Farwell Trust Company of Chicago, representing certain proposed investors (Rec. 402). He spent the greater portion of a week at the dam site. He observed that *material had been dumped into the dam from trestles*

diagonally crossing the core-wall to the extent of approximately forty thousand or fifty thousand cubic yards; that the material lying next to the core-wall was generally coarse; voids not filled; the angle of dumped material was lying at the natural angle of repose; he saw about ten second feet of water flowing freely through the dam (Rec. 403. This water percolated through six hundred feet of fill. The elevation of the water in the reservoir was then but two to three feet above the water immediately above the core-wall; that the effect of so dumping the material was to create a conical shaped dump, the coarser material rolling to the bottom; that the material from the borrow pits was insufficiently puddled; that if properly puddled, this material was proper to make an impervious dam; that his conclusion as to the cause of the water flowing through the dam was the stratification of the material caused by dumping from diagonal trestles, making it impossible to properly puddle. (Rec. 404). He says it would be impossible to correct that defect except by re-building. (Rec. 404).

This witness also saw excavated rock from the top of the spillway placed within fifteen or twenty feet of the core-wall, dumped in piles. That portion of the dam could not be made impervious without removing or spreading the material; that this rock fill was partially covered with gravel. The witness gave it as his opinion that if this dam should be completed upon the structure already built, it would be unsafe to attempt to impound the intended head of water; that the flow of water through the structure would be such as to endanger the whole; that he would not advise attempting to impound one hundred and ten feet of water.

Witness further said that *if the dam had been constructed in strict accordance with the contract and specifications, it would, in his opinion, have made a safe dam to impound one hundred and ten feet of water* (Rec. 405).

W. F. Day (Rec. 411), an engineer of seven years experience, temporarily residing in Boise, spent eight days in the examination of the Mackay dam in September, 1910, while in the employ of James A. Green & Co., and probably for the purpose of Green's report to the Farwell Trust Company. He found the water at that time coming through the dam five and ten second feet; the water in the reservoir was only twelve feet higher than the water below the dam, and only 2.8 feet above the water immediately above the core-wall. He took levels at the time. He saw more than one fill open to observation made from tracks diagonally crossing the core-wall. He remembers three such diagonal tracks and there may have been others. In most places the material as it lay against the core-wall was coarse, voids not filled, and it was of such a character that water would flow through freely; the slope of the fill was the natural angle of repose, which condition is utterly inconsistent with sufficient puddling; in which event the angle would have been flatter. Assuming that the dumping was from twenty-five-foot trestles and the puddling insufficient, the necessary result would be the coarse materials would roll to the bottom, making a pervious stratum; *that when the dumping is from tracks diagonally crossing the core-wall it is impossible to so puddle the material as to bring the fines against the core-wall. The only way the center could be made impervious is to remove the material and reconstruct the dam.*

The witness gives it as his professional opinion that if this dam should be completed upon the structure already built it would not be a safe or sufficient structure to impound one hundred and ten feet of water; doesn't think that much could be impounded, and to so attempt would be very hazardous. The witness further expresses the opinion *that if the Corey contract and specifications had been strictly followed, the dam would have been safe and sufficient to impound one hundred and ten feet of water.* He says that the material in the borrow pits was such that *by proper handling according to the contract and specifications, an impervious center would have been obtained.*

As against this impressive array of testimony, Goyne Drummond stands almost alone. We do not contend that he was willfully corrupt. We do contend that he was deplorably weak, and obviously under the influence of Corey. Enough has been shown, we think, to prove that on any disputed point his testimony should not be taken seriously.

Now it stands utterly undisputed in this record "that this dam as constructed is substantially wanting in efficiency for the purpose for which it was designed." The court below in its opinion said that this proposition "cannot be doubted" (Rec. 654). *That this dumping from diagonal trestles and fills was sufficient of itself to cause this "substantial want in efficiency"—resulting in the action by the State of Idaho annulling the whole enterprise, is substantiated by the testimony of five engineers of undisputed standing, each of whom saw and examined this dam and reached his conclusion thereupon without*

any reference whatsoever to this litigation. The State of Idaho acting independently, through its engineers, reached the same conclusion and acted thereupon. This is shown by the testimony of Roberts. The court below in its opinion said, referring to the specifications prescribing the manner in which this fill should be made if the contractor should elect to dump the material from trestles (Rec. 657): "Unquestionably to some extent the plaintiff deviated from the course thus prescribed." The lower court, however, after conceding the undisputed testimony as to this deviation, reaches the conclusion that *all the testimony as to the effect of that deviation is wrong* (Rec. 658), saying: "It may be conceded that if this method had been generally adopted in the construction of the dam its efficiency and strength may have been measurably impaired, but such construction was limited and exceptional and what was done was with the full knowledge and approbation of the chief representative *in the field** of Arnold and Company, if not of their managing engineer at Chicago." *But all the testimony in the record* as to the effect of this "limited and exceptional" departure from the specifications was, that it was sufficient to destroy the effectiveness of the dam. The learned judge of the District Court in determining to draw his own conclusions from the admitted facts at variance with the conclusions of all the engineers who testified, and in basing this variant conclusion on the "limited and exceptional" character of the fatally weak portions of the dam, overlooked the perfectly well known fact so forcibly impressed about once a year upon the

* Italics are ours.

dwellers along the levees of the great Mississippi, that a little leak (if it cannot be stopped) with appalling swiftness becomes a big one. Now the leaks through this dam could not be stopped. That is undisputed. And the testimony in this record is also undisputed, that the necessary and inevitable and invariable result of such leaks as this dam held, by reason of the blind drains formed by the diagonal fills, grow as time passes; *and that the rapidity of their growth is vastly accelerated by the increased head of water in the reservoir.* In other words, it was the invariable conclusion of all the experts that in view of the amount of leakage with the small head of water heretofore contained in that reservoir, an attempt to fill the reservoir to 110 feet, the head provided by the contract, would inevitably result in the dam going out. With the greatest respect for the court below, we urge that the conclusion of the learned judge was opposed to all the testimony and cannot be justified on the ground of common knowledge. All the witnesses say that a leak as extensive as this *through a fill* will enlarge until the fill is destroyed. That is also common knowledge.

The court below next finds (Rec. 659) that the specifications are defective in their provisions for wetting or puddling, and that therefore this leaky condition was due, not to the admitted failure of the Corey Company to observe its contract in what all the engineers and the State of Idaho hold to be a vital part, but to defects in the specifications. Here again the learned judge of the District Court reaches a conclusion directly opposed to the conclusions of all the witnesses who testified upon that subject. Mr. Storrow was the first witness who testi-

fied upon the subject, and he, *on cross-examination*, was asked whether if the specifications for the dam had been strictly followed by the contractor a good dam would have resulted, and he answered yes. The other engineers who followed him were asked this same question upon direct examination and gave the same answer, and their cross-examination failed to cast any cloud over the correctness of that conclusion (Rec. 252, 397, 405, 413). Was, then, the learned District Judge justified in disregarding all this unimpeached testimony from engineers whose standing and skill cannot be questioned, and substituting a different conclusion of his own?

In paragraph 8 of Specifications, under the heading "Details of Construction" (Rec. 514-515), it is provided that the central sixty feet of the dam shall be *puddled*. Storrow says that the object of puddling is to *fill the voids*; if it does not accomplish that it accomplishes nothing and can have no purpose. This puddling is done by throwing on a stream of water of such capacity as to carry the finer particles from a place where they are not needed to a place where they are needed, *thus filling the voids of the latter place and making it impervious*. The accuracy of this expert opinion is obvious. *It was recognized by Corey and even by Drummond*. (See Corey's testimony, Rec. 433-434; Drummond's cross-examination, Rec. 179). Corey says: "That was the object (of wetting) to wash it toward the core; *that was my understanding of what the contract required*." "To wash out the fine particles down toward the center." "I understand the object of this puddling near the core-wall was to get *imperviousness there*."

Again reverting to that pertinent suggestion of the court below that any doubtful provision of the contract is made clear by the understanding and interpretation placed upon it by the parties themselves during its execution, it would seem that little doubt remains that the parties to this contract both of whom were in the dam business, knew what was meant by "puddling", and knew that this contract meant that the central sixty feet of the dam should be puddled to the point of imperviousness to the head of water required to be held.

Now, the learned court below suggests that the plaintiff was not an expert dam builder; but, with all respect, we suggest that the records shows the contrary (see Corey's testimony, Rec. 197), and that the record also shows that by the contract the plaintiff undertook to supply expert services in that line. It provided (par. 2) that the contractors shall give "*competent attention* to the work and shall also keep a *thoroughly competent foreman* constantly upon the work." Other provisions of the contract are mentioned hereinafter which are confirmatory of our contention that the above language means (this being a dam contract) that the contractor shall be a competent dam builder and shall give the work the superintendence of a competent dam builder. Corey having had extensive experience in dam building did not hesitate to sign such a contract.

The learned judge of the District Court suggests that if plaintiff had insisted upon puddling the sixty-foot zone sufficiently to accomplish the only purpose of puddling, viz, imperviousness, and the Irrigation Company had objected to that puddling, and, on the ground of such objection, had refused to pay for it, the Corey Company might

find difficulty in collecting. If the Corey Company had insisted on doing proper puddling and the Irrigation Company had refused to allow it, a different question might arise. But, after all, this suggestion of the learned judge, instead of being an argument against the construction of the contract, for which we contend, is merely pointing out an unfortunate result of a contrary construction.

But the vital point of which the learned judge of the District Court, we think, lost sight, is this: *The undisputed evidence shows that the dumping in this dam from diagonal tracks crossing the core-wall rendered any amount of puddling insufficient; and of itself was a sufficient departure from the contract to ruin the dam.* There is no evidence that any defect in the dam was of sufficient extent to utterly ruin it, except the diagonal fills. The evidence is complete and uncontradicted that those diagonal fills were sufficient for that purpose.

The final conclusion of the learned Judge of the District Court is shown in the opinion (Rec. 660), as follows:

"I am convinced that the vital defect in the dam is the absence of a bond between the superstructure and an impervious stratum underlying the bed of the reservoir, and that therefore it is of slight importance how the material in the earth embankment was deposited, or how much or how little puddling was done. While there may be very little direct evidence to this effect, from the testimony of the mortgagee's engineers, touching the practicability of rendering the dam serviceable, and from other features of the record, the inference is unavoidable that no alterations of or additions to the structure would avail, unless connection were in some way made with an impervious foundation, and the certainty whether such a bond is feasible makes it doubtful whether the structure is of any value at all."

It is true that the plaintiff Construction Company, directly in the teeth of the provisions of the contract, which are so plain as to require or permit of no interpretation, failed to bond the dam at all points with an impervious stratum underneath. *But, evidence that such failure was sufficiently extensive of itself to cause the failure of the dam is*, as the learned Judge intimates, lacking in this record. And we respectfully suggest that the issues here should be decided, not upon conjecture, but upon the weight of evidence. The core-wall was fissured and leaking. There is no evidence that the leakage through the dam passed through the bottom of the reservoir, thence into the ground below the depth of the bottom of the sheet piling, concrete wall and cut-off trench, thence horizontally six hundred feet through the uniformly mixed and unstratified bed on which the dam rested and then upward to the surface. Such a leakage as that would tend naturally to decrease with time on account of the silt setting in the bottom of the reservoir (Rec. 350). And we respectfully insist that the court below, in concluding that this failure to bond the foundation of the dam with an impervious stratum below it was the chief cause of the failure of the dam, is without substantial evidence in its support, and is, in the teeth of the practically undisputed testimony, that the *diagonal fills constituted the one variation from the terms of the contract, which of itself and unaided was sufficient to and did render the structure useless.*

But, was the Corey Company authorized to depart from the plain provisions of the contract in such a manner as the court suggests would render the dam a failure,

otherwise than with the written assent of the chief engineer; in other words, without a modification of the contract assented to by the Irrigation Company itself, or by its agent, pursuant to the authority vested by the contract in such agent?

The provisions of the contract itself relating to the foundation of the dam are explicit, requiring no interpretation. On the second page thereof (Rec. 485) it is said:

"It being distinctly understood that wherever the specifications conflict with this agreement, the terms of this agreement shall govern; also that all work that may be called for in the specifications and not drawn on plans, or drawn on plans and not called for in the specifications, is to be executed and furnished as if described in both these ways."

In paragraph one, under the title: "Details of Construction," in the specifications, it is provided:

"From the termination of the sheet piling a trench is to be dug through the layer of gravel and this trench back-filled with material, making a bond with the impervious material underlying the thin gravel layer at the higher elevation."

In paragraph five, under the same heading, it is provided:

"In general these trenches will be excavated as shown on the plans, but the object in view is to excavate to and into the impervious stratum below the foundation of the dam, and such changes will be made as the work progresses as are found necessary."

It is true that the blue print sent from the Chicago office of the Arnold Company indicated a depth of six feet below the original surface for both the core-wall and the back-filled trench. The contract, however, plainly provided that where it and the plans were in conflict the contract should govern; and that where the specifications made a provision omitted from the plans, the specifica

tions should be followed. It was plainly impossible, moreover, to show upon the blue print prepared in Chicago, the exact depth of either the core-wall or the back-filled trench; that could be ascertained to a certainty only by the excavation upon the ground as the work progressed; even test pits or borings would be no certain test, for the composition of the underlying soil greatly varied. The blue print merely showed that the core-wall and the back-filled trench extended below the original surface of the ground. By measuring the line indicating the bottom of the trench and the core-wall, and comparing with the scale on the map a depth of six feet was indicated. That is the only way that a six-foot depth was shown. That fact, however, coupled with the impossibility of the Chicago office knowing where impervious material was to be found at the various points in the two thousand feet of length of this dam, and with the obvious and well-known fact that the depth of impervious material was not uniform throughout that two thousand feet, and the further fact that the contract plainly provided that the foundation should go to impervious material, should have indicated to any intelligent contractor that he should follow the contract, notwithstanding the blue print was uncertain in its meaning. It is also true that the young engineer, Coy, whom Corey subsequently got discharged, indicated upon his stakes a six-foot depth; but it is also clear that he, owing to his inexperience and youth, gave the blue print a different meaning than he would if he had properly considered it in connection with the contract and other circumstances. To the experienced engineer these plans did not indicate a six-foot depth (Rec. 408).

Here we beg to direct the Court's attention to the fact that the contract in this case (Plaintiff's Exhibit No. 23) is quite explicit. It placed burdens on the contractor which he could not shift. It provided (Paragraph 3) that the contractor shall give "*competent attention to the work and shall also keep a thoroughly competent foreman constantly upon the work.*" This being a dam contract, the above language means, if it means anything, that the contractor shall be a competent dam builder and shall give the work the superintendence of a competent dam builder. As a matter of fact, Corey was an experienced dam builder and therefore did not hesitate to sign a contract with that provision.

The contract further provides (Paragraph 2) that: "Contractor shall provide all labor and material necessary for the *complete and substantial* execution of everything described or *reasonably implied* in the following specifications." It also provides in the preamble that the contractor shall build the dam and other works "*ready for operation of the irrigation system.*"

It also provides (Paragraph 2) "all work that may be called for *in the specifications* and not drawn on the plans, or drawn on the plans and not called for in the specifications, is to be executed and furnished as if described in both ways; and *should any work or material which is not called for in the specifications and plans but which is nevertheless necessary for the proper carrying out of the obvious intentions thereof and of this contract, the same shall be deemed to be implied and required.*"

The contract further provides (paragraph 8) that the

contractor guarantees all workmanship and material furnished by him to be *first class in every particular*, and agrees not to use any material, whether furnished by him or otherwise, known to him to be inferior or defective.

The specifications provide (paragraph 2, under "General") that: "Construction details are shown on the drawings accompanying these specifications, but if the contractor discovers that the drawings of the work will not provide satisfactory construction, it is *his duty to immediately stop the work* in question and notify the engineer in writing," etc.

It is also provided (paragraph 1, under "Materials and Workmanship") that: "All construction work of every class in connection with the work herein specified, shall be done in a workmanlike manner. All due attention shall be given to the relative sequence of the various parts of the work to the end that all parts of the work shall be constructed at such *relative times as are necessary to secure the greatest stability and permanence in the complete work when finished.*"

It is our contention that under this contract the contractor agreed that he was a competent dam builder; that he knew how to build a dam so it would subserve the purpose of its creation; that he agreed not only that he knew how to build a good dam, but that he would do so; that he was not warranted in departing from the plain terms of the contract, because some sub-engineer or inspector—not the chief engineer—authorized verbally (but not in writing), or tamely acquiesced in, such departures; that he was not authorized on the verbal permission or weak acquiescence of a sub-inspector whose good will had been

secured by gifts, to use methods in the construction work in the teeth of the contract, and which resulted, and which he should have known would result, in the interference of the State to protect the lives and property of its citizens.

We claim further, that under this contract Corey was not authorized to build such a dam as he did build, even if the methods used had not been in violation of the specific terms of the contract, and even if they had been acquiesced in by the chief engineer, since the methods adopted would necessarily result in the failure of the dam and such result was obviously and easily to be foreseen by a competent dam builder. But here these improper methods were forbidden by the contract; were not authorized in writing at all as provided by the contract; were not even known to the chief engineer; and were also in conflict with the *general duty of the contractor to construct a good dam*.

The Corey Company knew that this was a Carey Act enterprise (Rec. 201); it was chargeable with knowledge of the laws of the United States and of the State of Idaho governing the construction of irrigation systems under the Carey Act; it knew, or was chargeable with knowledge, that under the law the contract with the State Land Board lay at the foundation of the rights of all the parties; it must have known from the presence of and supervision by the representatives of the State Engineer, as well as from the terms of the law, that the work must proceed under the terms of the contract with the State Land Board, and under plans and specifications approved by it, otherwise the Irrigation Company's only source of income, namely: payment by the settlers upon their water rights

contracts, would fail. That is to say, it was chargeable with knowledge that under the law collections could only be made from the purchasers of the water rights, provided the dam and other irrigation works were constructed with strict regard to the requirements of the contract with the State Land Board. And, therefore, when he, an experienced dam builder, ventured to construct works substantially varying from the plans approved by the State Land Board and approved by the State Engineer, he knew he was furnishing a structure for which the Big Lost River Irrigation Company could receive no pay and which must certainly drive the Company into insolvency.

The Corey Company's position necessarily is that it, knowing what constituted a good dam; being under contract to build a good dam; knowing that the Irrigation Company would get nothing whatsoever for its vast expenditures, unless it built a good dam; knowing that the bondholders would receive no security for their money, unless a good dam was built, could build a poor and ineffective dam and then, relying only upon the weak acquiescence of a "friendly" engineer, could collect the contract price from the Irrigation Company, who could get no benefit from the structure.

But the vital fact which, as before stated, we think the learned Judge of the District Court failed to keep in mind was that the *evidence* is clear, and practically without dispute; that while the puddling did not comply with the intention of the contract as understood and construed by the parties at the time; and while there was a failure to bond the foundation of the dam with an impervious stratum below as clearly provided by the contract; and

while excavated rock from the tunnel was placed within fifteen feet of the core-wall, in piles, so as to interfere with proper puddling; yet there is no substantial evidence that any of these alone, or all of these together, did destroy the effectiveness of the dam; *while the evidence is clear and undisputed that the dumping from the diagonal tracks crossing the core-wall was sufficient to and did cause such leaks as to make the dam a useless structure and practically valueless.*

This proposition being clear, there remains to be considered the question whether the Corey Company is excusable for thus destroying the dam because of the knowledge and acquiescence of Drummond therein; in other words, whether the Irrigation Company was bound to accept a worthless structure because Drummond, without authority from it, meekly acquiesced in a plain departure from a provision of the contract which obviously had for its sole purpose the securing of a water-tight dam.

The learned Judge of the District Court meets this question by holding, first, that no order *in writing* was necessary to authorize a clear departure from the contract; and, second, that Drummond was the chief engineer of the enterprise. Let us see whether these conclusions are warranted by the record. In the specifications we find the following (Rec. 497-498).

“No change from the designs as shown on the plans shall be allowed in the construction of any part of the work without written authority from the engineer. In case unforeseen difficulties in the construction work necessitate such changes, they will be authorized by the engineer, in writing, and the contractor shall then construct the work in accordance with the revised plans, and shall be paid for the same at the contract rates.”

In this case the directions as to how the fill was to be made in case the contractor chose to dump from trestles were explicit and not subject to interpretation. "No unforeseen difficulties in the construction work" arose necessitating any change therefrom. The Corey Company by this change in the system of dumping was enabled to get the same money for less work. We submit, therefore, that not only was no departure from these clear terms of the contract allowable except by an order in writing, but also that a change in respect to the manner of dumping gravel was not permissible under a proper interpretation of the above provision of this contract, even with a written order.

Was Drummond the chief engineer? The contract says, under the title "Definition of Terms" (Rec. 484) :

"The term 'engineer' is used to designate the consulting engineer, duly appointed and assigned by the company to have general charge of all work incidental to the construction of the company's project ready for operation."

Can it be claimed that Drummond had "general charge of all the work incidental to the construction of the company's project ready for operation?" *An estimate was never paid without the signature of Rosecrans as chief engineer* (Rec. 162, 376, 379, 381). The plaintiff, in a letter signed by Corey as president of the Corey Company, *addressed Rosecrans as chief engineer* (Rec. 545).

Every one, apparently, who had anything to do with the project understood that Rosecrans was the chief engineer "in general charge of all work incidental to the construction of the company's project ready for operation."

Plaintiff's witness Drummond testified that Rosecrans was the chief engineer (Rec. 167, 173, 174, 176). Also Hurtt, president of the Irrigation Company (Rec. 158) ;

also Corey (Rec. 191, 193), Corey says this was the specific agreement, from the beginning. Also Spear (361); also Rosecrans (374); also Arnold (381); also Coy (386); also Wayman, plaintiff's witness (449). Little did Drummond suspect that he himself bore this dignity with which the learned Judge of the District Court clothes him. Corey himself, president of the Construction Company, so testified. Hurtt, the president of the Irrigation Company, so testified.

The blue print plans in evidence bore the signature of Rosecrans approving them as chief engineer. In fact, prior to the final argument of this case, it does not appear to have dawned upon the consciousness of any man that Drummond or any other person except Rosecrans was the chief engineer having "general charge of all work incidental to the construction of the Company's project ready for operation." If, as pertinently stated by the learned District Judge, an interpretation placed upon a contract by the parties to it at the time of its execution must bind them and the Court, we respectfully insist that it is now too late to invest Drummond with the dignity of chief engineer "having general charge of all work incidental to the construction of the Company's project ready for operation."

It being conceded then that this dumping from diagonal tracks was a plain violation of the contract, was not authorized in writing, was merely acquiesced in by Drummond, was not known to Rosecrans, the chief engineer, (that is his testimony, and it is undisputed, Rec. 379, 370, 149), was not even reported to him by Drummond when the State was threatening to close down the work on the

dam for that reason alone; and it being undisputed that the State, on account of this deviation, condemned the structure and forbade the further sale of water rights, thereby putting the Irrigation Company in a position where it was practically deprived of all corporate rights (Rec. 268, 271, 310, 416), is the Corey Company excused because of the weak acquiescence of the friendly Drummond, and is the Irrigation Company bound by such acquiescence to pay for the useless structure?

The provision in the contract that no change or deviation should be made from the provisions of the contract, except by written order of the chief engineer, was a reasonable and valid provision. It was a limitation upon the authority of the engineer when acting as the agent for the Irrigation Company, of which limitation the contractor had full notice. This agent could no more exceed his authority and thereby bind his principal than could any other agent. This provision of the contract was designed and well calculated to protect the owner against just such subserviency and complacency as that exhibited by Drummond. The authorities on this point are clear. See:

Carter vs. Root, (Neb.) 121 Northwestern, 952.

Langley vs. Rouss, 185 N. Y. 201.

Kelly vs. St. Michael's Roman Catholic Church, decided by N. Y. App. Div. January, 1912, reported at page 767 of May 11 issue of Law Reports and Session Laws.

Molloy vs. Village of Briar Cliff Manor, 145 App. Div. (N. Y.) 483.

Bannon vs. Jackson, 117 Southwestern (Tenn.) 504.

White vs. San Raphael R. R. Co. 58 Cal. 417.

Mishoud vs. McGregor, 61 Minn. 198.

Howard vs. Pensacola R. R. Co. 24 Fla. 560.

Moreover, as above stated, we contend that entirely aside from the question of written authority to vary from the terms of the contract in respect to the dumping from diagonal tracks, Drummond had no authority to consent to or acquiesce in such departure from the terms of the contract. The provision of the specifications quoted above relating to departures from the contract indicates that such deviations should be permitted only when made necessary by some insuperable difficulty. No such difficulty here existed. Drummond had no implied authority from his principal to consent to a damaging departure for the sole benefit of the Corey Company. See:

United States vs. Walsh, 115 Fed. 701 (Court of Appeals, Second Circuit).

Town of Sterling vs. Hurd, 98 Pac. 177 (Colo. 1908).

Ryan vs. Reservoir Co. 104 Pac. 221 (Utah 1909).

The contention has been made in this case that the payment of the monthly estimates by the Irrigation Company constituted an acquiescence in the departures from the terms of the contract by the Corey Company. The law is clearly the other way, as shown by the three cases last above cited, and the following:

Mercantile Trust Co. vs. Hensey, 205 U. S. 298.

Hartupee vs. Pittsburg, 97 Pa. St. 107.

Tharsis Sulphur and Copper Co. vs. McElroy, L. R. Eng. 3 App. Cas. 1040.

For the convenience of the Court we quote from the cases cited upon this point. The language of the various courts is pertinent herein, not only on the question of the effect to be given to progress certificates, but also upon the weight to be given to so-called acquiescence in departures from the plain terms of the contract:

In *U. S. vs. Walsh*, 115 Fed. 701 (Court of Appeals, Second Circuit), the Court said:

"The contractors undertook to construct a dry dock according to the plans and specifications. The contract provided that the construction should conform in all respects to the specifications, and that there should be no change or modification of the specifications in any respect except upon the written order of the bureau of yards and docks. The authority of the engineer in charge was only that conferred by the contract and the contractors were informed by the instrument under which he exercised his authority of its extent and limitations. *If he had expressly consented to an unauthorized performance, his acts would not have bound the government. Much less is the government bound if he consented to an improper performance of the contract by neglect or mistake.* He had no power to authorize a departure from the requirements of the specifications, unless it was delegated by that clause which provides that the work is to be subject to his approval and inspection, and permits him to reject any materials or work which he may deem unsuitable. *That provision is one for the benefit of the government.* It is to be construed as an additional safeguard against non-compliance with the specifications by the contractors, and against a literal but unsatisfactory compliance."

In *Town of Sterling vs. Hurd*, 98 Pac. 177 (Colo. 1908), the Court said:

"The error committed by the trial court was the result of assuming that the town, by taking the precautions it did under the provisions of the contract

to safeguard its interests, and employing an engineer with the authority thereby conferred, was precluded from litigating the question of the non-compliance of the plaintiff with his contract after the system was completed. *The acceptance by the engineer or his acquiescence as the work progressed, if the evidence should establish this to be the case, could not be regarded as anything more than important evidential facts tending to prove that the work and materials complied with the contract.*

In *Ryan vs. Reservoir Co.* 104 Pac. 221 (Utah, 1909), the Court said:

“Nor is the fact that the person who it is contended represented the respondent in this case while the work of constructing the dam was in progress, made no objections, nor submitted any matters to the referee conclusive as against the respondent. No doubt the fact that no objections were made while the work was being done was important, but it was at most only evidence more or less strong that the work and material were in accordance with the provisions of the contract. This would also be so if the work had been accepted by the superintendent of respondent as claimed by appellant, since the contract nowhere provides that the superintendent should be the sole judge of whether the terms of the contract had been complied with, or that his acceptance of the dam should be conclusive upon that point, but the contract in different clauses provides that the work shall be done in accordance with the specifications stated in the contract, and under the supervision of the superintendent of respondent.”

Hartupce vs. Pittsburg, 97 Pa. St. 107, was an action for the price of engines supplied under contract. Plaintiff relied on monthly estimates and progress payments to show substantial performance. The Court said:

“His monthly estimates and certificates had reference only to the apparent value of the work done and not to the quality to him unknown of the iron used.

In none of his reports does he refer to the quality of the metal in the castings or the wrought iron work. No certificate declares the materials were of the quality specified in the contract."

In *Tharsis Sulphur & Copper Co. vs. McElroy & Sons*, L. R. Eng. 3 App. Cas. 1040, action was brought for extras in supplying iron girders heavier than required by the contract. The contract provided that no alterations or additions should be made without written order of the engineers, and that no allegation by the contractors of knowledge of, or acquiescence in such alterations by the company, or their engineers, should be accepted as doing away with the necessity for such certificate. The contractor relied upon written estimates of the engineers, which included these girders at the heavier weight put in instead of as specified, on which estimates payments had been made. Held, no recovery, these estimates not being equivalent to written orders.

Lord Hatherly said:

"Now, my Lords, the function of a certificate of this kind, which is not by any means an uncommon instrument, is this. The engineer of the Company is expected by the company to inform them whether they have sufficient value on their premises in the course of the execution of the contract, either in goods or material supplied, or in the cost of working up those materials to justify an advance. The certificate is not sent in as a bill for payment, there is no such bill at that time. The bill for payment is provided for in this agreement, as in most agreements of this kind which I have seen. The bill for payments is to be 25,000 pounds, when all the work is done, subject to deductions * * * But when the company want to know whether or not they are in a condition to make an advance, they ask the engineer," etc.

The departure from the provisions of the contract in

this case was of such a character as to defeat the lien. In certain cases where the departure from the contract has been slight and of such a character as to be fully compensated for by way of damages, the lien has been allowed for the amount of the contractor's claim, less the owner's damages. This, however, is not such a case. Here the structure is valueless (Rec. 256). The rule laid down in the American-English Encyclopedia of Law is as follows:

"The doctrine of substantial compliance with building contracts does not apply when the omission or departures from the contract are intentional, and so substantial as not to be capable of a remedy, and an allowance out of the contract price would not give the owner substantially what he contracted for."

See:

Elliott vs. Caldwell, 43 Minn. 357.

Also, where the omission constitutes a structural defect of so essential a character that it cannot be remedied without partial reconstruction of the building, this rule does not apply. See:

Spence vs. Ham, 163 N. Y. 230.

"Where the contractor fails to perform a considerable part of the work required under the contract, his failure, irrespective of whether his intention was good or bad, constitutes a bar to his enforcement of a lien for the work performed. If the defects are so numerous and prevailing as to show that the contractor did the job in a slovenly and improper manner, not conforming substantially with the plans and specifications, and if they are so essential as to defeat the intention of the parties to have the work done in a particular manner, the contractor, unless there has been a waiver, cannot enforce a lien."

Fox vs. Davidson, 36 N. Y. App. Div. 159.

Glacius vs. Black, 50 N. Y. 145.

Anderson vs. Petercrt, 86 Hun (N. Y.) 600.

In *Bloom, Mechanic's Liens*, Sec. 342 and 343, the rule is stated as follows:

"If there has been no wilful departure from its provisions, and no omission of any of its essential parts, and the contractor has in good faith performed all of its substantive terms, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed. If the omission or imperfection is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor, by a recoupment for damages, the contractor does not lose his right of action."

"The owner has a right to have built the structure he contracted for, and not another. Even his caprices, if expressed in the contract, must be complied with, even though they would not have added to the value of the structure, or may have lessened its value. It is only when this plan has been substantially embodied in the work that the Court can have an occasion to estimate the deficiencies."

The California Supreme Court in *Perry vs. Quackenbush*, 38 Pac. 740, said:

"Nor does the finding that the difference between the value of the house as actually constructed and as it should have been was only \$350, tend to show that the contract had been substantially performed. That might have been true, though the structure were totally unlike the house contracted for. The owner has a right to have built the structure he contracted for, and not another. Even his caprices, if expressed in the contract, must be complied with, even though they would not have added to the value of the structure, or may have lessened its value. It is only when this plan has been substantially embodied in the work that the Court can have an occasion to estimate the deficiencies. The authorities are very clear upon this

point. There are a variety of cases to which the so-called modern equitable rule has been applied. *One is where the contractor fails to complete the structure.* In such case it is said, if the contractor has done or furnished anything of which the owner avails himself, such owner may be made to pay the value of it, after deducting all damages resulting from the failure of the contractor. In such case it has been sometimes said that it does not matter why the contractor failed to perform. Another case is where there is a defect which can be remedied. Here the contractor may recover the contract price, less damages caused by the failure, including costs of supplying the deficiency. Another case is where the contractor has endeavored, in good faith, to perform his contract, and has substantially performed, but there are some unimportant defects, arising through accident or inadvertence. Here, the defects not being such as defeat or materially change the design embodied in the contract, the contractor may recover, less damages occasioned by the failure. In such case there must be a substantial performance of every material covenant in the contract, and the failure must not have resulted from design or bad faith; and whether these facts exist is a matter to be determined by the jury, or the Court sitting as a jury. Substantial performance must be found."

In the case of *Schmidt vs. City of North Yakima*, 40 Pac. 790, the Supreme Court of Washington said:

"The plaintiff agreed to do the work strictly in accordance with the plans and specifications for the sum accepted. The testimony in this case plainly shows that the contractor insisted frequently upon supplying material different from that which was contracted for, and upon doing the work in a manner different from that which was specified in the contract. It is not sufficient for him to say that the material substituted is as good as that which was specified. The question of quality was determined by the contract. It must be presumed that all these questions had been in the minds of the contracting

parties, had been discussed by them, and that the kind of material which they concluded was best for the purpose was the kind which was specified. They had a right to have all such questions as that settled and determined before the contract was entered into. They were settled and determined by the contract, and the contractor has no right now to have the question of the relative worth of material litigated. It was for the very purpose of preventing the litigation on this question, and of preventing the subjection of their judgment to the judgment of a jury, that these specifications were made, and in this case, outside of any certificate of the engineer, the city would have the right to the kind of material for which they contracted, and to have the material placed in the sewer in the manner in which they contracted."

"The rule, even where the courts hold most strictly, is that where the contractor in good faith intended to comply with the terms of his contract, and has substantially done so, but there are some slight omissions or defects caused by inadvertence or mistake which are not so essential as to defeat the object of the parties, or, as it has been sometimes expressed, do not go to the root of the subject matter of the contract, but are easily susceptible of remedy, so that an allowance of the contract price will give the other party full indemnity, and give him in effect just what he bargained for, the contractor may recover the contract price, less the damages on account of such defects or omissions * * *."

Leeds vs. Little, 42 Minn. 414; 44 N. W. 309.

"If in an action at law the builder would be allowed to recover any sum after the abatement to the owner of his damages, for the non-completion of the contract, then in a suit in equity he would likewise recover. Justice is thus done to both parties. If the deficiencies are unimportant, and may be easily made up, the lien is still good."

West Va. Bldg. Co. vs. Saucer, 45 W. Va. 483; 31 S. E. 965.

"When the builder has in good faith intended to and has substantially complied with the contract, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the damage on account of such defects * * *"

"There must be no wilful or intentional departure, and the defects must not pervade the whole, or be so essential as that the object which the parties intended to accomplish, to have a specified amount of work performed in a particular manner, is not accomplished."

Phillips vs. Gallant, 62 N. Y. 256.

In another case a barn was constructed on contract, but the contractor did not construct it according to the specifications. The Court said:

"On examining the record and analyzing the evidence relating to the various items of omissions and defects in the work which are made the basis of the referee's findings that the plaintiffs failed to perform their contract, we see no reason for differing with him in the conclusion at which he reached * * *. The referee was right in his view of the evidence upon the question of fact as to the performance of the contract. The defects pervade the whole work. They were very substantial, and not merely unimportant mistakes; and some of them, if not many, wilful and intentional departure or omissions from the contract. Under such circumstances the complaint was properly dismissed."

Smith vs. Ruggiero (N. Y.) 65 N. Y. S. 89.

In the case of *Hawke vs. Arundel Realty Co.* 98 Minn. 219, 108 N. W. 842, the Court said:

"When this formal defect (license to use vacuum system for circulating steam) is supplied, the contract will have been substantially performed. The case accordingly falls within the familiar rule entitling a building contractor to a mechanic's lien up-

on the substantial performance of his contract, and despite some slight omission or defects, which were not so essential as to defeat his claim, or, as it is sometimes said, do not go to the root of the subject-matter of the contract, but are easily susceptible of remedy."

"It is clear, upon the plaintiff's own evidence, that he did not substantially perform the contract. He admits that he left undone over one-twentieth of the work, consisting of numerous items. He did not overlook this work, but simply neglected it; * * *

The claim is made that the trustees and bondholders are in no position to raise this question of noncompliance; that it is purely a question between the contractor and the owner; and that if the owner, who has mortgaged this property for more than its present value, who is admittedly insolvent (Rec. 160, 228) and was insolvent during the time that practically all the alleged debt accrued (according to complainant's contention), who has no interest in defeating a lien, who has parted with all his interest in the property to these bondholders, sees fit to acquiesce in unjust and unconscionable demands by complainant, the bondholders, the real parties in interest, are powerless. Such, we believe, is not the law. See:

Eastmore vs. Bunkley, 113 Ga. 637.

Carson vs. White, 6 Gill (Md.), 17.

Adams vs. Central City Granite Brick Co. 154 Mich. 448.

Federal Trust Co. vs. Guigues, 76 N. J. Eq. 495.

Brown & Hoff vs. Cornwell, 108 Va. 129.

Knabb's Appeal, 10 Pa. St. 186.

Dunham vs. Woodworth, 158 Ill. App. 486.

Title Guaranty & Trust Co. vs. Burdette, 104 Md. 666.

- Adams vs. Central City S. B. & B. Co. (Mich.)*
 117 N. W. 932.
Dittmer vs. Bath, 117 Mich. 571.
Thomas vs. Turner, 16 M.d. 105.
McAdam vs. Bailey, 1 Phil. 297.
Inman vs. Henderson, (Ore.) 45 p. 300.
See 34 Century Dig. Sec. 450, p. 2634.

It is admitted by complainant that the Irrigation Company long before this suit was brought or this lien claim filed had parted with its entire interest in this property, to the extent that it had mortgaged the property for more than its value. Plainly, by all principles of equity, the Irrigation Company, after having so parted with its interest, ceased to have power to bind the successor in interest by admitting away the title to the property.

But, the Irrigation Company never has attempted to admit away its right. It never accepted this work (see affidavits of Rosecrans and Arnold and testimony of Hurtt, Rec. 148, 451, 452). The issuing of certificates, aside from a final certificate, is not an acceptance of the work. Moreover, the chief engineer, who alone had authority to issue the certificates, was not upon the ground and was ignorant of these gross violations of the contract by Corey and was kept in ignorance by the obliging (to Corey) Mr. Drummond. The evidence is clear that neither the officers nor the engineers of the Irrigation Company ever accepted this work. Not only did the Irrigation Company fail to take any affirmative action toward accepting Corey's work or waiving its right to reject or admitting away its property to Corey; but, on the contrary, the Irrigation Company, after the filing of

this bill, *filed its answer denying that Corey had performed his contract or is entitled to a lien*. Paragraph 9 of the answer reads as follows:

“9. Further answering, denies that plaintiff has fully kept and performed its part of the agreement and contract referred to in bill of complaint, or has fully performed the labor and furnished the material required by it.”

The last paragraph disputes complainant's claim to a lien and prays to be dismissed; *and the answer is sworn to by C. B. Hurtt, the President of the Company*.

The Irrigation Company, therefore, far from admitting away its rights or waiving any objection to Corey's work, or attempting to give away its property to Corey, has disputed his claim. It has thereby left the real parties in interest, the bondholders and their trustees, at liberty to fight the case on its merits and protect their property against the unjust demands of Corey, if the bondholders see fit to do so. If the Company had made a *bona fide* settlement with Corey a different question would arise, but it made no settlement with Corey, *bona fide* or otherwise. The least the Irrigation Company could, in good faith, do, was to refuse to accept the work or settle with Corey, or do anything toward prejudicing of the rights of its successors in interest after it became insolvent and had parted with all real interest. This it did.

The following are quotations from the authorities above cited as to the right of the Trustees to question the Corey Company's compliance with its contract. They are submitted to save the Court unnecessary labor.

In *Eastmore vs. Bunkley*, 113 Ga. 637, the Court said:

“This was a petition by Eastmore against the New Cumberland Island Company to foreclose a contrac-

tor's lien for a sum alleged to be due for constructing and repairing a certain dam and dock or pier on Cumberland Island. No defense was filed by the company, but at the trial term, over the objection of the plaintiff, the Court allowed the executors of W. R. Bunkley to intervene and become parties defendant, on a petition in which they alleged that, as such executors, they held a mortgage on the realty against which the lien was sought to be established, which was for purchase money of the property and was a superior lien; that the defendant company was insolvent and the property insufficient in value to pay the mortgage debt; that the holders of the mortgage would have to pay the plaintiff's claim if his alleged lien should be established; that these petitioners were not apprised of the foreclosure proceedings at the first term, and had just been apprised of it for the first time; and *that the defendant company's failure to defend was due to its hope to impose a charge on the mortgaged property and thereby save itself from further obligation to pay it, which was wrongful and fraudulent.*

"As a logical conclusion of the ruling just made, we must treat the intervention as having been properly allowed by the court below; and it follows that the defendants in error, having come into court in a legal manner, are entitled to file their pleadings denying the plaintiff's allegations and setting forth their reasons why the relief prayed for in the petition should not be granted. The answer which the interveners filed was of this nature, and the motion to strike it was properly denied."

In *Carson vs. White*, 6 Gill (in Court of Appeals of Maryland), on page 23, the Court said:

"At January term, 1846, the appellee appeared in court and suggested that before the filing of the claim of lien, 4th July, 1844, the defendant mortgaged the said ground to him, and on the 5th of August, 1844 (before the filing of the said claim of lien by plaintiffs) the defendant applied for the benefit of the insolvent laws of Maryland, and the ap-

pellee suggested that he is 'the party in interest in the matter in this suit against said property,' and prayed the court to be permitted to defend the suit.

"The record states that the leave was granted and the appellee accordingly appeared to said suit by his counsel.

"A mortgage will afford very little security for the debt intended to be secured thereby if, after its execution the mortgagor could, by admissions, create liens on the mortgaged premises and thereby lessen, or it might be, destroy the value of the mortgage. The mortgagor can, by no acknowledgment subsequently to the mortgagee prejudice the interest of the mortgagee. The admission made in this case by the mortgagor ought not to have been admitted in the trial of those issues. * * *

"Why should not he be permitted to appear? This is a proceeding *in rem* and is designed to charge, with the claims of the appellant's property conveyed to the appellee, and the legal title to which we must assume was in him. Who was the proper person to appear and resist this claim, as a claim against the mortgagee's interest? It cannot be that the mortgagor was the only person to decide whether the claim should be resisted or admitted.

"It is suggested that John Carsons, Trustee, appointed upon his application of the insolvent laws, was the proper person, and no doubt he was a fit person to defend the equity of redemption which had been conveyed to him, if he thought it of any value; but it is equally clear that the appellee was not bound to abandon his title to the protection of the trustee, over whom he had no control, and who, by his acts, admissions and omissions, might prejudice the rights of the appellee. If the appellee, claiming the property as he did, could not defend the suit, surely the plaintiffs ought not to be permitted to obtain a judgment by which his interest was to be affected."

In *Adams vs. Central City Granite Co.* 154 Mich. 448, the Court said, p. 458:

"After the building was erected, and before this

claimant had filed notice of his lien, the owners mortgaged the property in question, and other property to the appellant. Dayton did not at any time render to the owner a statement under oath of the number and names of laborers in his employ, and of every person furnishing the materials. He was paid from time to time sums of money, the total of which nearly equals the original contract price. His contention here is ruled against him by *Kerr-Murray Mfg. Co. vs. Power Co.*, 124 Mich. 111, unless it can be said that, because Dayton paid his men weekly and had paid for all material furnished to the building, and because he had, before filing a lien, agreed with the owner upon the balance due him, remaining unpaid, the case is to be distinguished from the one referred to and is ruled by *Walker vs. Syms*, 118 Mich. 183, and *Bollin vs. Hooper*, 127 Mich. 287. Claimant is here asserting not merely a demand against the debtor, but a lien upon real estate in which others besides the owner claim an interest in it as lienors. *Wiltsie vs. Harvey*, 114 Mich. 131. The owner could not waive compliance with the statute so as to bind the mortgagee, appellant. *Dittmer vs. Bath*, 117 Mich. 571. The case is not within the rule, or exception, of *Walker vs. Syms*, or of *Bollin vs. Hooper*.

In *Dittmer vs. Bath*, 117 Mich. 571, the Court said, p. 572.

“We discover no evidence that the complainant had served upon the land owner Bath, a statement under oath of the number and names of the sub-contractors and laborers in his employ, and of those furnishing materials, and the amount due or to become due to them, and the decree indicates that there was no such testimony, as it contains a finding that the service of the same was waived by defendant Bath. The court held that the mortgage of the defendant Schenck was a prior encumbrance to complainant’s lien, and the decree required the sale to be made subject to the mortgage, and costs were awarded to Schenck against the complainant, who has appealed. The briefs discuss but one point, viz., whether the failure to serve the notice required by Section 4, Act No. 179, was a

sufficient ground for the ruling of the Circuit Judge that the mortgage should have priority over the lien. We have held that a failure to comply with Section 4, Act No. 179, Acts 1891, is fatal to proceedings, to enforce a lien. *Wiltsie vs. Harvey*, 114 Mich. 131. This is upon the ground that compliance with such section by serving a sworn statement must be shown or at least waived, to warrant the commencement of an action or proceedings to enforce a lien. (Citing cases) Under Section 9 of the lien law * * * a lien terminates at the expiration of six months after the statement or account is filed with the Register of Deeds, unless proceedings to enforce the same are commenced within that time. In the case before us, there was no service of the statement within such period, and as the suit, brought before the expiration of the time, was prematurely brought, because of the non-performance of the condition precedent, the lien was at an end as to the defendant Schenck, who had a right to avail himself of any irregularity destructive to complainant's lien, as she was directly benefitted thereby. This was held in the case of *Wiltsie vs. Harvey*, *supra*. The alleged waiver was not made until March 30, 1896, and if this was effective to support the decree against the defendant Bath, which we do not find necessary to determine, as he has not appealed, it cannot have such effect against the defendant Schenck. The decree is affirmed with costs."

In *Federal Trust Co. vs. Guigues*, 76 N. J. Eq., a suit was brought to foreclose a mortgage dated May 27, 1907, and filed for record the following day. At the time the mortgage was made there was in course of construction a dwelling house, the contract price of which was upwards of \$33,000, and toward the erection of which the four defendants claimed to have performed labor and furnished materials. The debts claimed by them, respectively, therefore, not having been paid, they filed lien claims under the provisions of the Mechanics' Lien Law against both con-

tractors, and in consequence were made parties defendant to the suit. The Court said, p. 498:

"The building was commenced before the execution of the mortgage, and the situation is, therefore, such as that if the lien claims are valid under the provisions of the lien law, they have priority over the complainant's mortgage.

"Two questions are raised by complainant against each of the lien claims. The first one concerns the validity of the claims under the lien law, and the second touches the size of the curtilage, and I will take up the claims *seriatim*."

The Court then proceeds to pass upon the question of the lien claims, and the amount thereof, and renders judgment accordingly, the questions above mentioned being raised by the mortgagee only.

In the case of *Brown vs. Cornwell*, 108 Va. 129, the Court said (p. 130):

"This is a suit in equity brought by appellants, as general contractors, to subject a dwelling house, the property of appellee Cornwell, to a mechanic's lien * * *

"The appeal is from a decree of the Circuit Court, sustaining demurrers to the original and amended bills in the case.

"The controlling question to be determined involves the sufficiency of the account filed by claimants and whether it constitutes a valid mechanics' lien under the statute.

(Here follows the provisions of the Virginia Code relative thereto).

"The account relied on in this instance altogether omits to show the prices charged for the items of which it is composed. Nor does it appear, either from the account or the accompanying statement, that the materials were contracted for at a gross sum, so as to bring the case within the influence of that line of decisions of which *Taylor vs. Netherwood* is a conspicuous type."

The Court then proceeds to discuss the question whether the account was sufficient, and holds that it was not. The Court further said (p. 132) :

"The assignments, that the demurrer to the original bill ought not to have been considered because it did not appear on whose behalf it was filed, and that there was no written demurrer to the amended bill, are not well taken. * * *

"With respect to the other objection—that it does not appear on behalf of which defendant these demurrers were filed: There were only two defendants to the suit, namely, the owner of the building sought to be subjected, and the trustee in a deed of trust executed by the owner upon the property to secure a debt. It was competent for either defendant to resist the effort of the plaintiffs to fix a mechanics' lien upon the building, and the demurrer of either, if sustained, would defeat the lien and inure to the benefit of both, consequently plaintiffs could not have been prejudiced by the fact that the record does not disclose on behalf of which defendant the demurrers were interposed.

"The distinction between defenses which are personal to one defendant and those which are common to all is well illustrated by the following authorities:

"In *McCartney vs. Tyrer*, 94 Va. 198, this court said: 'The defense of the statute of limitations was not made by the debtor, the defendant company, but by * * * its principal creditor. The defense is generally a personal privilege and may be asserted or waived by a defendant at his election. *Clayton vs. Henley*, 33 Gratt. 72; and *Smith vs. Hutchinson*, 78 Va. 683. When, however, a court of equity has taken possession of the estate of the debtor for the purpose of distribution, and proceeded to ascertain the debts and encumbrances to enable it properly to administer and distribute the assets, an exception to the general rule is allowed, and any creditor interested in the fund is permitted to interpose the defense of the statute of limitations.'

The Court cites numerous authorities on that proposition.

"So also, in *Cartinge vs. Raymond*, 4 Leigh, 626, it was held: 'Upon a bill in chancery by a distributee against an administrator and his surety, alleging that the administrator had not duly accounted, and praying an account, the bill is taken pro confesso as to the administrator, but the surety answers and proves that the plaintiff, on a full and final settlement, has released the administrator and so is not entitled to an account; upon which the chancellor dismisses the bill with costs as to both defendants. The bill was properly dismissed as to both defendants.'

"Again in *Harisson et al. vs. Walker, Executor*, 95 Va. 721, the Court observes: 'We are of opinion that the Court did not err in sustaining the demurrer of the executor to the bill and dismissing the cause as to him. Neither did it err in dismissing it as to Mrs. Harrison, although she failed to appear and make defense. The defense of the executor, her co-defendant, was not personal to him. It went to the foundation of appellant's right to recover upon the case stated.'

"So in the case at hand. The demurrers put in issue the existence of the mechanics' lien, and the dismissal of the original and amended bill as to both defendants was corollary to sustaining demurrers, no matter by which defendant they may have been interposed."

In *Knabbs Appeal*, 10 Pa. St. Rep. 186, the Court said (p. 192):

"These views, in affirmance of the validity of the liens, make it unimportant to decide the other question made on the argument, namely, whether subsequent encumbrancers can be admitted to object deficiencies in the statement in avoidance of the lien. But upon this question we entertain no doubt. Until now their right to do so has never been questioned. It was permitted, without objection, in the much contested case of *Thomas vs. James*, 7 W. & S. 381; no one dreaming of a doubt. A claim filed is not in the nature of a judgment pronounced by a court. It is, as was decided at the present term, but a means,

partaking of the character of process, of enforcing a statutory lien. It comes not, therefore, within the principle upon which the doctrine of *Hauer's Appeal*, 5 W. & S. 473, and other similar cases is based. This is proved by the whole scope of the Act of 1836, and particularly by the provisions of Sections 5, 9, 13, 23 and 25, which evidently contemplate and provide modes for the interference of mortgages, judgment creditors and other encumbrances, having no estate in the premises bound."

In *McAdam vs. Bailey*, 1 Phila. Rep. p. 297, the Court said:

"The simple question in this case is whether a person who holds a mortgage executed subsequently to the commencement of a building will be allowed to come in and make defense to a *scire facias* on a mechanics' claim. The *scire facias* is expressly directed to be served on the premises and as a *terra tenant* would be compelled by a judgment in proceedings, he may of course come in and claim to have defense. But is the mortgagee a *terra tenant*? He evidently, to the extent of his security, is liable to be cut out by mechanics' liens; he has an interest, and why should he not be heard? It has been said that so has any judgment creditor an interest to be affected. The difference between a judgment creditor and mortgagee is very plain. The latter has a title a *jus in re* as well as well as *ad rem*. For all purposes essential to the maintenance of the security, he is the legal owner. He is the purchaser within the statute, 27 Elizabeth, may recover possession by a judgment and have a writ of estrepement to stay waste. It is very plain that when an estate is encumbered much beyond its value, it may not be sufficiently important to the insolvent owner to induce him to spend time and money controverting particular claims. Very gross injustice might result if the mortgagee, who has as much advanced his money on the faith of this specific property as the man who may have taken an absolute title, could not be allowed to make defense in this case. We think the affidavit shows sufficient ground to justify us in referring this matter to a jury for decision."

In *Dunham vs. Woodworth*, 158 Ill. App. 486 (decided in November, 1910), the Court said:

"Appellant, as executor of the estate of Dunham, deceased, filed a bill in equity to enforce a mechanics' lien and foreclose a mortgage against Lot No. 15 in Woodworth's addition to the city of Robinson.

"It was averred in the bill that appellee, Woodworth, was the holder of a mortgage on the premises, the lien of which was inferior to and subject to the mortgage and mechanics' lien of appellant, and that the other defendants had, or claimed to have, claims for labor and material furnished against the premises. A cross-bill was filed by appellee Woodworth, and answers having been filed to the bill and cross-bill, the cause was heard by the court, who found the equities of the parties to be, that the mortgage of appellant was a first and prior lien, that the mortgage of appellee was next in priority, and that the claims for mechanics' liens of appellant and John W. Kessler were inferior to the mortgage liens. * * *

"We have carefully examined the certificate of evidence to find whether the bill was filed within four months after the completion of the delivery of the material, but find no evidence as to when it was delivered. This lack of evidence is fatal to the bill so far as its effectiveness under Section 21 of the Statute is concerned. There is the same lack of any such evidence so far as the filing of the claim for lien is concerned. Before the lien could be enforced it must be shown by competent evidence that the claim for lien was filed or the bill filed to enforce the lien within four months after the final delivery of the material. This was imperative, and in the absence of such evidence no right to a lien against Woodworth was shown, and the decree of the court giving the Woodworth mortgage priority was right."

In *Title Co. vs. Burdette*, 104 Md. 666, Barnes on December 16, 1905, filed a bill in the Circuit Court against the Independent Methodist Church to enforce a mechanics' lien for work done by him on the building. The bill

was filed on behalf of Barnes and also for such other persons interested "herein" who may contribute thereto. On the same day the church filed its answer, consenting to a decree as prayed, and a decree was passed for sale.

On December 23, 1905, Barnes assigned his lien to Burdette, one of the appellees. On January 13, 1906, the Title Guarantee & Trust Co. filed a petition, alleging that it held a mortgage made February 3, 1905, against the Church building, none of the debt having been paid. The Court said, p. 675:

"Jones and McCullough are not thus estopped, however. They denied the validity of plaintiff's claim when they first intervened by petition and were made parties defendant on May 3, 1906, but they failed to take any subsequent steps to support their attack upon this claim. It being admitted as correct by the answer of the church, such admission, for the purposes of the decree, was equivalent at least to primary proof. *Strike's Case, supra*, p. 70. Assuming, *ex gratia argumenti*, that this was only primary proof, they should have asked leave to take testimony, as they had ample opportunity to do, to sustain their attack upon plaintiff's claim, before audit was made. Primary proof stands in the place of full proof until full proof is demanded." (Citing cases).

In *Thomas vs. Turner and Yardley*, 16 Md. 105, *scire facias* was sued out under the mechanics' lien laws by appellees, on the 23d day of December, 1854, to enforce a claim for \$690.10, filed on the 22d day of December, 1854, against two houses and lots in the City of Baltimore, for lumber furnished at different periods between May 10 and November 9, 1854, for the construction of the houses of Jacob E. Kridler, as the architect, builder and owner or reputed owner thereof. The Court said, on pages 110-111:

"The record furnishes no evidence whatever that any fraud was perpetrated, or intended, by Kridler, in

the settlement made on the 18th day of September. It is proved that about the last of November following, he absconded from the City of Baltimore; but it nowhere appears that he contemplated such a step two months before, or that any of the causes then existed which afterwards induced him to run away and fly from justice. There is no evidence to impeach the bona fides of the settlement of the 18th of September, it was made in conformity with his long established course of dealing with the appellees. Nor is there any force in the other ground taken by appellees; the words of the Act expressly deny the lienor his remedy by scire facias, till the expiration of the credit and there is no reason why the defense should not be as available to any one whose property is sought to be charged as to the party with whom the contract is made. If materials are to be furnished to a builder or contractor on a credit, it could not be pretended that the claim could be enforced by scire facias against the property of the owner before the credit had expired. In the judgment of this Court, the eighth prayer of the appellant ought to be granted, which, upon the facts therein stated, denied to the appellees the right to recover in this proceeding any of the items in their lien claim filed which were included in the note and receipt given in evidence."

II.

Corey Brothers Construction Company made this Contract and Entered Upon This Work Without Complying With the Foreign Corporation Laws of the State of Idaho, the Contract Cannot be Enforced in any Court, State or Federal, and Appellee Is Not Entitled to a Mechanics' Lien Based on Such Contract and Work.

Corey Brothers Construction Company is a Utah corporation. This contract was made in Idaho with an Idaho

corporation in June, 1909. The contract provided for its being executed in Idaho and this appellee commenced work in Idaho about June 15th, 1909, and carried it on there. On August 5th, 1909, this appellee obtained a certificate of the Secretary of State (Rec. p. 537), that it was authorized to do business in the State of Idaho, having filed its articles of incorporation with the Secretary of State on that date and its designation of agent for the service of process (plaintiff's Exhibits 31 and 34). A copy of the articles had been filed with the County Recorder of Custer County shortly before (plaintiff's Exhibit 33). These are the facts relied upon to show the compliance of appellee with the Idaho law.

The Idaho Constitution, Article XI, Section 10, provides:

"No foreign corporation shall do any business in this State without having one or more known places of business, and, an authorized agent or agents in the same, upon whom process may be served, and no company or corporation formed under the laws of any other country, State, or Territory, shall have or be allowed to exercise or enjoy, within this State any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this State."

Section 2792 of the Revised Codes of Idaho provides in part as follows:

"Every corporation not created under the laws of this State must, before doing business in this State, file with the county recorder of the county in this State in which is designated its principal place of business in this State, a copy of the articles of incorporation of said corporation, duly certified to by the Secretary of State of the State in which said corporation was organized, and a copy of such articles of incorporation duly certified by such county re-

corder, with the Secretary of State, paying to the latter the same fees as are provided by law to be paid for filing original articles of incorporation. Such corporation must also within three months from the time of commencement to do business in this State, designate some person in the county in which the principal place of business of such corporation in the State is conducted, upon whom process issued by authority of or under any law of this State, may be served, and within the time aforesaid must file such designation in the office of the Secretary of State, and in the office of the clerk of the District Court for such county, and a copy of such designation certified by either of said officers, must be evidence of such appointment. * * *

"No contract or agreement made, in the name of, or for the use or benefit of, such corporation prior to the making of such filings as first herein provided, can be sued upon or enforced in any court of this State by such corporation."

Then, after prescribing certain other penalties and denying such corporations the benefit of the statutes of limitations, the section continues:

"Provided, that foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain, and shall be subject to the laws of the State applicable to like domestic corporations." (Our italics.)

It is the testimony of Corey that the contract was made just before he started work. He started work about June 15th, which was about the date the Irrigation Company was incorporated. Just before that time the contract and specifications and plans were drawn up and agreed upon, to the last letter and figure, between complainant on the one hand and the promoters of the Big Lost River Irrigation Company, who then owned all the assets which

were, on the organization of the Company, turned over to it (Rec. p. 90). These promoters became the incorporators and then the directors and officers of the Company. The Company was organized for the very purpose of taking over the property owned by Speer *and the contract already made by complainant*. The Company on its organization elected directors, officers and an executive committee. These directors, officers and executive committee all knew from the time they were so chosen (and before) that Corey was proceeding with the work under this contract; and they conferred with him and recognized him and his contract. In other words, they ratified his contract, not on August 26th, when they authorized the signature, but promptly on the organization of the Company and long before the complainant attempted to secure a license to do business in Idaho. In other words, this contract of appellee became binding upon the Irrigation Company from the date of its organization, June 15th; and appellee worked under this contract from that date until August 5th before acquiring the right so to do (Rec. p. 165, 190, 191, 192, 226, 416). Corey says that the contract, even to the last letter and figure, was agreed upon before he went to work. The subsequent signing of the contract was not its beginning, but the creation of better evidence of its terms. Before June 15th it was drawn up, the signatures of the parties in typewriting appended, the date of the execution left blank and two blank lines left for the signatures of the officers. Corey Bros. Construction Company worked from June 15th to August 5th under this contract in defiance of the Idaho statute. *The allegations of the bill of complainant* (Rec. p. 7) are to the

effect that the contract between the Corey Brothers Construction Company and the Irrigation Company was in full force and effect on June 15th, 1909.

The facts above recited show clearly that at the time the contract was made upon which this action is based and the work begun under it, Corey Brothers Construction Company had not complied with the Constitution and statutes of Idaho as to foreign corporations, and the only question to be determined is as to the effect of such non-compliance when properly pleaded by defendants in an action brought in the Federal Court sitting in Idaho wherein the foreign corporation seeks the benefit of a mechanic's lien conferred by the Idaho statute. Appellants contend that this foreign corporation is no more entitled to sue upon this contract in the Federal Court than in the State Court and that it certainly is not entitled to a mechanic's lien based on such contract.

We are aware that the Federal Courts have held that under a New York statute somewhat similar, though not the same, as this Idaho statute, a foreign corporation, doing business in New York without having procured a license so to do, may sue in the Federal Courts, though denied the privilege of suing in the State Courts of New York. *This rule, however, is based squarely on the proposition that the court of last resort in New York has held that a contract so made in New York by a foreign corporation doing business there without a license, is valid and enforceable, except in the New York State courts.*

The Federal Courts have held, as indeed they must, that the construction placed upon this statute by the New York Court of Appeals is binding on the Federal Courts;

and the New York Courts, having held that such a contract is binding and enforceable, except in the New York State Courts, the duty of the Federal Courts is plain.

That, however, is not the situation here. The Idaho Statute and Constitution, as construed by the Idaho Supreme Court, has the same meaning as the Wisconsin Statute, considered in Diamond Glue Co. vs. United States Glue Co., 187 U. S. 611; also reported in 103 Fed. 838. That Wisconsin Statute said that such a contract by a non-complying corporation should be void on its behalf but enforceable against it; which of course, means that it is not void at all; but merely that while enforceable against the company it is unenforceable by it anywhere. That statute was upheld by the United States Supreme Court. The language of the Idaho Supreme Court gives to the Idaho statute precisely the same meaning.

The United States Supreme Court has firmly established the rule that the Federal Courts will follow the construction of the highest courts of the State in regard to the validity or enforceability of contracts made in violation of the foreign corporation laws.

Diamond Glue Co. vs. United States Glue Co., 187 U. S. 611; 47 L. Ed. 329.

Chattanooga Bldg. & Loan Assn. vs. Denson, 189 U. S. 408, 47 L. Ed. 871.

David Lupton's Sons Co. vs. Auto. Club, 225 U. S. 489, 56 L. Ed. 1177.

An examination of the Idaho cases on the subject discloses that such contracts are declared to be unlawful and void when sued upon by the offending corporation, although the defendant may waive the objection by failure

to plead it, but that the contract may be enforced as against the foreign corporation and its invalidity does not entitle a party dealing with the corporation to affirmative relief because of such invalidity.

The first case construing this section was *Katz vs. Her-
rick*, 12 Idaho 1; 86 Pac. 873. This was an action on a note made to a foreign corporation which had not complied with the statute when the note was made, although it did comply subsequently. The plaintiff was an endorsee with notice. The Court held the provision of the constitution self-executing, that the statute was mandatory and that the plaintiff could not recover. The Court said with reference to the section of the Idaho constitution quoted above:

“It will be seen that in the very inception of our existence as a State the framers of the constitution provided that no foreign corporation shall do any business in this state without having first authorized a legal agent in this state upon whom process may be served, and also having established a known place of business. *This provision of the constitution is self-acting*, and self-operative to the extent that it requires the facts therein enumerated to actually exist at the time such corporation begins to transact business within the state. The constitution, however, failed to require the corporation to furnish evidence of such facts and make the same a matter of record within any designated office or offices. The legislature, nevertheless, in the exercise of its undoubted power and authority, enacted Section 2653 and thereby pointed out the specific acts and things necessary to be done by any foreign corporation in compliance with the constitution and statutory provisions, and in order to entitle it to do business within this state. The people, in adopting Section 10 of Article 11 of the Constitution clearly announced and proclaimed the policy of the State toward foreign corporations, and have said in unmistakable language that such

artificial beings existing only by the will of a foreign state, *must subject themselves to the jurisdiction and the law of this state before they can have any recognition or legal existence within its borders.*" (page 16). * * *

"It will be seen that the Constitution requires that a corporation shall have an authorized agent and a known place of business before transacting any business within the State. The statute says that '*before doing business in this state*' a foreign corporation *must* comply with the statute, etc. *It also provides that no contract or agreement can be enforced by any corporation that has failed to comply with the statute. This language seems to us to clearly indicate both the intention of the framers of the constitution and of the legislature to prohibit any transaction of business until the statute has been complied with. The purpose and spirit of these provisions indicate a clear intent to make such contracts unlawful. It would hardly be consonant with the duties of the courts and the office of the judicial department of the State to uphold and enforce contracts at the instance and on the application of corporations or individuals that have transacted business in the manner and under conditions which both the framers of the Constitution and the legislative department of the State have said shall be unlawful. The courts are established for the purpose of upholding and enforcing the Constitution and laws of the State, and when once they have arrived at the purpose and intent of the law-making department, it is their duty to enter such judgment and decrees as will render effective that intent. The corporations that have transacted business without observing the legal requirements, and also their assignees with notice, are therefore left without a remedy for the enforcement of such contracts.* (Pages 17 and 18). (Our italics).

Agan, in the same case on rehearing, the court used this language:

"We take it that when the framers of the Constitution said that 'No foreign corporation shall do any

business in this State without having one or more known places of business and an authorized agent,' etc., and the people adopted it into their organic law, that they meant exactly what the clear and unmistakable language employed implies. We cannot understand how such language can require construction or interpretation. It carries with it on its face its own construction and meaning."

On page 18 the Court also quotes with approval from *Clark and Marshall on Private Corporations* at Sec. 847-B of Vol. 3, as follows:

"Most of the courts hold that the object of the statute is to prohibit foreign corporations on grounds of public policy, from doing any business in the State until they have complied with all the conditions precedent prescribed by the statute; that this prohibition is absolute, and *renders illegal* contracts made by a foreign corporation in the State in violation of the statute, and that since the contract is thus illegal, the corporation *cannot maintain an action to enforce the same.*"

The Court also quotes with approval from the opinion of Justice Walker in *Cincinnati Mutual Health Assurance Co. vs. Rosenthal*, 55 Ill. 85:

"When the Legislature prohibits an act, or declares that it shall be unlawful to perform it, every rule of interpretation must say that the Legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, *that the courts shall hold it void.* This is as manifest as if the statute had declared *that it should be void.* * * * To permit such contracts to be enforced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to appellee we entertain no doubt."

The Court also said (p. 28):

"We fail to see any greater evil in allowing a citi-

zen to interpose as a defense the fact that a foreign corporation has failed to comply with the constitution and statute in appointing an agent and establishing a known place of business, than there is in allowing such companies to come into the state and prey upon its citizens in total disregard of the law and say that such contracts are binding and enforceable. We have never held, and never intended so to do, that such contracts are entirely and absolutely void. On the contrary, we intimated in the original opinion that *they are enforceable on the side of the party with whom they have assumed to contract*. We did say, however, that *the corporation should be without any remedy in the courts on an action to enforce contracts made by them while in default of compliance with the requirements of law*. The evil does not exist so much in the contract as in *the legal existence of one of the contracting parties*.

"They come into the state, transact business in some capacity, but refuse to comply with the laws of the state that gives them a standing within its jurisdiction as corporations. They do business, *therefore, without name, identity or legal existence.*"

The case of *Valley Lumber Company vs Driessel*, 13 Idaho, 662; 93 Pac. 765, discussed the subject fully, although the case was decided solely on a question of pleading. The Court distinguishes three lines of cases on this subject:

First. States like California, which hold that the right of action is merely suspended until compliance, and, therefore, non-compliance must be pleaded as an affirmative defense.

Second. States which hold that such contracts are void and compliance is a condition precedent to the cause of action and must be pleaded by plaintiff.

Third. States where non-compliance will not be presumed and the defendant waives the objection unless he

puts the fact of compliance in issue by demurrer or answer.

The Idaho Court took this third or intermediate position, which differs from the second only in the matter of pleading. Under the second view a complaint is open to general demurrer where it fails to allege compliance and in the latter case it is open to special demurrer for want of capacity to sue. In the former case as the defect goes to the cause of action it can be raised even on appeal, while in the latter case as the Idaho Court held in the Driessel case, it cannot be so raised. In neither case are contracts absolutely void because they can always be enforced against the foreign corporation, so in the Driesell case the Court said, referring to *Katz vs. Herrick*, *supra* :

“The Court there held that the non-complying foreign corporation had no legal existence in this State and under the law was without a remedy for the enforcement of any contract made by it within the State, but did not hold that its contracts were absolutely void.”

In the later case of *War Eagle Mining Company vs. Dickie*, 14 Idaho 534; 94 Pac. 1034, the Court said :

“*In limine* it is proper to announce that our further consideration, since deciding the case of *Katz vs. Herrick*, of Section 10, Article 11, of the Constitution, and of our legislative enactment in accordance therewith, have all tended to reinforce the conviction that the principles announced in that case are correct and sound and we have no inclination whatever to depart from them in any respect.”

This statement effectually disposes of any contention that the Court qualified its decision in the *Katz vs. Herrick* case by the decision in *Valley Lumber Co. vs. Driessel*.

The later decision of *Tarr vs. Western Loan & Savings Co.* 15 Idaho 741; 99 Pac. 1049, shows clearly the construction put upon such contracts by the Idaho Supreme Court. Here plaintiff brought suit for the cancellation of a mortgage on the ground that it was executed in favor of a foreign corporation which had not complied with the statute, and, therefore, was null and void. The foreign corporation filed its answer and a cross-complaint for the foreclosure of the mortgage. Plaintiff answered the cross-complaint setting up defendant's non-compliance. The lower court granted judgment for foreclosure. On appeal this decision was reversed, the Court holding that the statute was mandatory and that a compliance after the contract was made, but long before suit was brought, could not avail the corporation. The Court also held that paying interest to the corporation could not estop the plaintiff to plead non-compliance. On the other hand, the Court indicated that plaintiff who had received a benefit under the contract, was not entitled to affirmative relief by cancellation.

We submit that these cases have construed the Idaho Constitution and Statute to mean that contracts entered into by non-complying foreign corporations are invalid and unenforceable in suits brought by it or its assignees with notice, but such contracts may be enforced against it.

We are not unmindful that the learned judge of the District Court who wrote the opinion in the case at bar, in the case of *Colby vs. Cleaver*, 169 Fed. 206, held that a foreign corporation, which had not complied with Section 2653 of the Idaho Statutes, might sue in the Federal Court. We respectfully submit, however, first, that the Court therein misconstrued the holdings of the Idaho Supreme Court on

this Statute. As we read the Idaho decisions, they hold *such a contract as being unenforceable by the corporation, anywhere*. If that is true it must follow that it could not be enforced in the Federal Court, not because the statute says that the contract cannot be enforced in the Federal Court, for perhaps the State has no right to limit the jurisdiction of the Federal Court, *but because that statute, as construed by the Idaho Supreme Court, fixes the status of such a contract as being unenforceable by the corporation*.

But in the case of *Hill vs. Empire State-Idaho M. & D. Co.*, 156 Fed. 797, the same learned judge said, with reference to the identical statute:

“Thereupon it is provided that contracts and deeds made or taken by such corporation while in default shall be void, and other penalties are prescribed.”

But again: the right of the plaintiff to claim a mechanic's lien, if any, rests upon Section 5110 of the Idaho Revised Code, which, among other things, provides:

“Every person performing labor upon or furnishing material to be used in the construction, etc., has a lien upon the same for the work or labor done or material furnished,” etc.

In the light of the language above quoted from *Katz vs. Herrick*, construing and interpreting the provision of the Constitution of Idaho, can it be said that a foreign corporation is within the meaning of the word “person” as found in Section 5110 of the Idaho Revised Code? Can it be said that a corporation which has no legal existence within a State is entitled to statutory rights conferred by the State?

We think it clear that a non-complying foreign corporation is not a “person” within the meaning of such a law.

Philadelphia Fire Association vs. New York, 119

U. S. 110.

Pembina vs. Pennsylvania, 125 U. S. 181.

The above cases do not have reference to statutes giving the right to a mechanic's lien, but they do in principle hold that a foreign corporation is not entitled to the protection accorded to a corporation which has complied with the laws of the State.

We submit that when due consideration is given to the language of the Constitution of the State of Idaho, as above pointed out (and this provision of the Constitution does not seem to have been considered by the Court in *Colby vs. Clearer, supra*), no lien can be established in favor of the plaintiff on a contract entered into, as alleged in the complaint, prior to the time when the complainant attempted to comply with the Constitution and the statute of Idaho.

But the Idaho Statute is perfectly clear on this point. Section 2792 has already been quoted so far as pertinent to the facts in this case. The first paragraph of the section enumerates the acts required as a compliance and the second paragraph provides several penalties for non-compliance. Then after providing that non-complying foreign corporations are not entitled to the benefit of the statutes of limitations the section closes with the following proviso:

"Provided, That foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain, and shall be subject to the laws of the State applicable to like domestic corporations."

This proviso is an affirmative grant to such foreign cor-

porations as comply with the Idaho statute, of the rights and privileges of domestic corporations. It doubtless was intended to apply to all the rights and privileges of corporations, common law and statutory, but it must certainly apply to rights such as the right to a mechanics' lien, which is purely a creature of statute; otherwise, the proviso is wholly without meaning.

Here we have this question presented. A citizen of Utah goes into the Federal Court in Idaho, not for the purpose of establishing his rights under the common law, or of establishing any rights arising under general law as administered by courts of equity, *but for the purpose of enforcing a right claimed under an Idaho statute*. Will the Federal Court in such suit, based on an Idaho statute, give him rights which he could not get in an Idaho court? If so, the situation is anomalous indeed.

The Federal Court will, of course, enforce Idaho laws when its jurisdiction is properly invoked. That is to say the Federal Court, sitting in Idaho, will enforce Idaho laws or statutes when passing upon a contract to which Idaho laws or statutes apply; just the same as a Federal Court, sitting in Idaho, would enforce California laws or statutes when passing upon a contract to which California laws or statutes apply. But, it is a novel spectacle, indeed, we respectfully submit, to observe a complainant invoking in a Federal Court anywhere, the laws or statutes of any State, and in the same breath asking the Court to give him relief *based upon those State laws or statutes, which the courts of that State would deny him*.

We wish to review briefly the holdings of the Federal Courts upon foreign corporation statutes which are sub-

stantially similar to the Idaho statute, because we think they are conclusive of this question and of this entire case as far as Corey Brothers Construction Company is concerned.

The Wisconsin statute has been referred to *supra*. In construing that statute in the case of *Diamond Glue Co. vs. U. S. Glue Co.* 103 Fed. 838, the Court said, at page 839:

“Dependent upon assent of the State, express or implied, it is clear that the assent may be granted upon such terms as the Legislature may impose (*Paul vs. Virginia, supra*), and that an enactment within the power of the State which prohibits the transaction of business therein by foreign corporations except upon compliance with certain conditions *invalidates any contract entered into in violation of the statute*, so that the contract cannot be enforced in any Court administering the law in such State (*Manufacturing Co. vs. Ferguson*, 113 U. S. 727, 733; 5 Sup. Ct. 739, 28 L. Ed. 1137, and cases cited). *Where the prohibition is plain, this rule governs equally with or without express terms in the statute declaring the invalidity of the contract.*” (Citing cases).

This decision was affirmed in 187 U. S. 611, the Court holding that it was bound to enforce the Wisconsin statute as construed by the Wisconsin courts.

In *Cooper Mfg. Co. vs. Ferguson*, 113 U. S. 727, the Court said:

“It must be conceded that if the contract on which the suit was brought was made in violation of the laws of the State, *it cannot be enforced in any Court sitting in that State charged with the enforcement of its laws.*”

The Alabama Constitution, Article 14, Section 4, provides:

“No foreign corporation shall do any business in

this State without having at least one known place of business, and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon an agent anywhere in this State."

This is substantially the same as the Idaho Constitution. The statutes enacted to carry out this provision also closely resemble the Idaho statute, and have been clearly construed by the State and Federal Courts.

Sections 3642 and 3643 of the Alabama Code of 1907 (Sections 1316 and 1317 of the 1896 Code) provide for the filing of a written designation of agent. Section 3644 (formerly 1318) provides:

"It is unlawful for any foreign corporation to engage in or transact any business in this State before filing the written statement provided for in the two preceding sections."

Sections 3647 and 3648 (formerly 1321 and 1322) provide for a franchise tax upon foreign corporations, and Section 3649 (formerly 1323) provides that:

"All contracts made in this State by any foreign corporation which has not complied with the provisions of the two preceding sections, shall at the option of the other party to the contract, be wholly void."

The Idaho statute as construed by its Supreme Court reaches exactly the result prescribed by the provision last quoted, but the courts in construing the Alabama statute have paid but little attention to this provision.

In *Chattanooga Bldg. & Loan Assn. vs. Denson*, 189 U. S. 408; 47 L. Ed. 870, the question of the enforceability of such a contract in the Federal Court was squarely raised and both the Circuit Court of Appeals and the Supreme Court held that the foreign corporation could not recover.

(See 107 Fed. 777). The Supreme Court, after referring to a number of Alabama cases, said at page 413:

"These cases constitute an interpretation of the Constitution and statutory provisions and clearly hold that any act in the exercise of corporate functions is forbidden to a foreign corporation which has not complied with the Constitution and Statutes and that the contracts hence resulting are illegal and cannot be enforced in the courts."

Two more recent cases on the Alabama law are: *In re Conecuh Lumber Co.*, 180 Fed. 249, and *Thomas vs. Birmingham Ry. L. & P. Co.* 195 Fed. 340.

In the latter case, in holding that the foreign corporation could not recover on the contract nor upon an implied contract arising from full performance on its part, the Court said, at page 342:

"The plaintiff contends that the statute does not preclude the plaintiff from seeking redress in the Federal Court. This is undoubtedly the rule where the effect given to the state statute by the courts is that it merely prevents the maintenance of a suit by the delinquent corporation. Johnson vs. New York Breweries Co., 178 Fed. 513; 101 C. C. A. 639. The rule is otherwise where the effect of the Legislature is to render void all contracts made and transactions done by the delinquent corporation within the State. Johnson vs. New York Breweries Co. 178 Fed. 513; 101 C. C. A. 639; Chattanooga Building Association vs. Denison, 189 U. S. 408; 23 Sup. Ct. 630; 47 L. Ed. 870.

"The Alabama legislation has been construed by its court of last resort to invalidate contracts and transactions done within the state by foreign corporations which have not qualified themselves to engage in business therein. Dudley vs. Collier, 87 Ala. 431; 6 South 304, 13 Am. St. Rep. 55. Alabama West Railroad Co. vs. Tally Bates Construction Co. 162 Ala. 396, 50 South. 341; American Amusement Co. vs. East Lake Chutes Co. (Ala.) 56 South. 961. Muller Co. vs. First National Bank of Dothan (Ala.) 57 South. 762. The

Federal Courts will follow the construction of the Alabama Constitution and Statutes in this respect. *Chatanooga Building Association vs. Denson*, 189 U. S. 408; 23 Sup. Ct. 630; 47 L. Ed. 870. *From this it results that no action can be maintained upon a contract, subject to this infirmity under the Alabama Statute in the Federal Court."*

The Pennsylvania Constitution, Article 16, Section 5, provides:

"No foreign corporation shall do business in this state without having one or more places of business and an authorized agent or agents in the same upon whom process may be served."

This provision is identical with Article 11, Section 10, of the Idaho Constitution.

The Pennsylvania statute (P. L. 108, passed in 1874) is in part as follows:

"Section 1. Be it enacted, etc., that from and after the passage of this act, no foreign corporation shall do any business in this commonwealth, until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein.

"Sec. 2. It shall not be lawful for any such corporation to do any business in this commonwealth, until it shall have filed in the office of the Secretary of the commonwealth a statement, under the seal of said corporation, and signed by the President and Secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein. * * * "

These provisions have been passed upon a number of times by the Circuit Court of Appeals of the Third Circuit.

In *McCanna and Fraser Co. vs. Citizens Trust and Surety Co.* 24 C. C. A. 11; 76 Fed. 420, the Court said, at page 421:

"The plaintiff did not comply with the second section, and consequently its business transacted here was unlawful. The construction and effect of the statute have several times been considered by the Supreme Court of the State (whose decisions in this regard are binding on us) and that Court has held that the transaction of business in Pennsylvania by a foreign corporation, under such circumstances, and all contracts pertaining to it, are unlawful."

The same rule was followed by that Court in the more recent case of *Pittsburg Construction Co. vs. West Side Etc. Co.* 83 C. C. A. 501; 154 Fed. 929, and in

Colonial Trust Co. vs. Montello Brick Works, 97 C. C. A. 144, 172 Fed. 310.

Buffalo Ref. Mach. Co. vs. Penn H and P. Co. 102 C. C. A. 196, 178 Fed. 696.

The Federal cases on the Oregon statute are also very instructive. There is no constitutional provision in Oregon corresponding to Article 11 of Section 10 of the Idaho Constitution, but there has been a similar statute since 1864. This statute was construed to render the contract void, and this construction was followed in the Federal Courts:

Commercial Bank vs. Sherman, 28 Ore. 573; 43 Pac. 658.

Re Comstock, 3 Sawy. 218, F. C. 3078.

Semple vs. Bank of Brit. Col. 5 Sawy. 88, F. C. 12659.

In 1903 the foreign corporation law was amended, and that statute confirmed the previous construction, providing in part as follows (*Lord's Oregon Laws*, Sec. 6726):

"Every foreign corporation * * * shall file the declaration and pay the entrance fees hereinafter provided and shall duly execute and acknowledge a

power of attorney * * * and such power of attorney shall appoint some person * * * as attorney in fact for such corporation for service of process * * *. It shall be the duty of every such foreign corporation, joint stock company, or association, to maintain at all times within this State some qualified person as its attorney in fact as herein provided, and in default thereof it shall not be entitled to transact any business within this State or *maintain any suit, action, or proceeding in its courts.*" (Our italics).

In the case of *Cyclone Mining Co. vs. Baker Light and Power Co.* 165 Fed. 996, Judge Wolverton, in an able opinion, discussed the effect of this statute upon the contracts of non-complying corporations. The wording of the statute it will be seen upon comparison, is almost identical with that of the Idaho statute and apparently the 1903 act had not been construed by the Oregon Court at the time of the decision. In sustaining a plea in abatement to the complaint of the foreign corporation, the Court said:

"It has been said that a corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty.' It cannot become a corporation or a citizen of any other state or sovereignty save that of its creation. If it does business in another state or sovereignty, it does so with the will or consent of the latter, either express or implied. By comity of the states as relates to the subject is meant that implied assent by which a foreign corporation is permitted to carry on its business in states other than that of its creation. As there may be comity of contract between different states and sovereignties, there may be comity of suit, which, without else, without express statutory regulations touching the subject, entitles a suitor to sue in jurisdictions other than his own. So that a foreign corporation may not only contract abroad, but may also sue abroad to enforce its contracts, under the rule of comity, where not superseded by statute or

other lawful regulation. A corporation may not transact business abroad, however, unless so permitted by comity or by some regulation of statute of the foreign jurisdiction. A state may withdraw its implied assent through comity, and it may inhibit the doing of such business within its borders absolutely, or it may impose such terms and conditions as it is so disposed, as a prerequisite to the exercise of such privilege. *And, where the policy of the state is thus made manifest in this respect through its legislation, the courts will not interpose to defeat its will, and will not give relief where none is intended, and especially where it is designed that such relief should be withheld.* These principles are adequately sustained by federal authority. (Citing cases). * * *

"It would be a vain thing to insist that the Federal Courts are not bound to the observance of the rule. Are not they in duty bound to enforce state laws, where falling within their cognizance and not contrary to the Federal Constitution or the laws of Congress, as well as the national laws? If it were otherwise, the states and the Union could not well or long co-exist." (Our italics).

La Moine L. & T. Co. vs. Kesterson, 171 Fed. 980, is a later case in the same Court following the same rule.

We are fully aware that cases in the Federal Courts may be found which seem to support the decision of the learned Judge in *Colby vs. Cleaver*, and in the case at bar, but upon analysis it will be found that these cases have merely followed State statutes and courts holding, as in California, that the remedy on the contract is merely *suspended* until the foreign corporation complies with the law; or, as the New York courts expressly hold, that the statute merely *closes the State* courts to the foreign corporation. And in none of these States is there a constitutional provision similar to Article XI, Section 10 of the Idaho Constitution, which was held in *Katz vs. Her-*

rick, 12 Ida. 1, to be self-executing and without any legislation to invalidate contracts made without compliance with its requirements. This constitutional provision in effect says that every contract made in violation of it, is unlawful.

It is therefore submitted that the decision of the trial court is not only unsustained by authorities, but is in direct contravention to numerous decisions of the higher Federal Courts on very similar statutes. Furthermore, such a construction would render the Idaho statute practically nugatory. In our western States there are a great many foreign corporations doing business on a large scale, such as construction companies, surety companies, and the like, which have no regular agents and no property regularly within the State. In almost every action these corporations have occasion to bring, their claim exceeds the jurisdictional amount, and under this construction of the statute they can sue the citizens of the State in the Federal Court and yet themselves be immune from suit because of their failure to designate an agent; and insofar as these statutes are designed for revenue purposes, the corporation can set them entirely at naught because it can have its remedy in almost any case in the Federal Court. In the case at bar, where the foreign corporation is not only seeking to enforce a contract which is invalid and unenforceable in the State Court, but to obtain the benefit of the statutory right of a mechanic's lien, we think there can be no question but that it is without remedy in the Federal Court sitting in Idaho and administering local law.

III.

The District Court Was Without Jurisdiction.

As under Equity Rules 47 and 48 a party whose presence will oust the jurisdiction of the court may be dismissed out of the action, provided he be not an indispensable party, the first question presenting itself is, what constitutes an indispensable party.

In *U. S. vs. Allen*, 179 Fed. 13, the Circuit Court of Appeals for the Eighth Circuit, defined indispensable parties as follows:

“Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.”

The question whether the Union Portland Cement Company, a corporation of Utah, and the other lien claimants, also citizens of Utah, were such indispensable parties that the Court had no right to dismiss the action as to them, must be determined largely by a construction of the Idaho Mechanics' Lien Act and the Civil Code of that State. In so doing it must be borne in mind that while a particular right to a lien is obtained solely by virtue of a Mechanics' Lien Act, yet no special procedure is provided by that Act; but on the contrary, Section 5124 provides that

“Except as otherwise provided in this chapter the provisions of this Code relating to civil actions, new trials and appeals are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter.”

In this respect the Act is analogous to the Illinois Mechanics' Lien Act of 1839, which provided that in proceed-

ings under it the court should be vested with the powers of courts of chancery and should be governed by the rules of procedure and decisions in these courts. And it has been accordingly held by the Illinois courts that the question of necessary parties must be determined by the rules of courts of equity, and that no decree should be entered unless all persons whose interests might be affected by the decree be made parties.

Kimball vs. Cook, 1 Gilm. 423.

Williams vs. Chapman, 70 Ill. 423.

Lomax vs. Dore, 45 Ill. 379.

Rall vs. Sullivan, 1 Ill. App. 94.

Section 4113 of the Idaho Civil Code provides: "The Court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties *the court must then order them to be brought in,*" and provides for the manner of bringing him in, etc.

Section 5120 of the Idaho Code relating to liens provides that in every case in which different liens are asserted against any property *the Court in the judgment must declare the rank* of each lien or class of liens which shall be in the following order, etc. (Providing for priorities).

It would seem clear that under these statutes it is essential that the Court not only determine the existence of a lien and its amount *but also its rank*. In order that the Court determine the rank of a lien it must necessarily *pass* upon all liens asserted against the property, and this

it could not do without the presence of the other lien claimants. These other lien claimants are therefore under equitable rules and the provision of Sec. 5120 of the Idaho Code indispensable parties without whose presence the Court cannot proceed to a decree.

It is apparent from the face of the amended bill filed in this cause and sworn to that the Portland Cement Company claims a lien upon the property in question. It was made a party for that reason. It was also apparent that it was a citizen of the same State as the complainant and that, therefore, this Court could not take jurisdiction, and it being an indispensable party, the Court could not dismiss it out in order to retain jurisdiction. This was not a case where Equity Rule 47 was applicable.

In *Gray vs. Haremeyer*, 53 Fed. 174, the necessity of having the lien claimants all before the court is well illustrated. That was a foreclosure to which various lien claimants were made parties. One of the lien claimants, Gray, appealed from the decree of the Circuit Court, assigning as error the refusal of the trial court to adjudge his claim to be the prior lien. Gray made the foreclosure complainants parties to his appeal, but omitted the balance of the lien claimants. The Court of Appeals said (p. 178) :

“The absence of necessary parties is perhaps the more readily conceivable with regard to the mechanics’s lien-holders, who were adjudged to stand on an equality with the appellant. By the decree of the Circuit Court it was determined that all the lien-holders were entitled to share equally in the proceeds of the sale after the payment of costs of \$12.00 to appellant, and of the sums due the mortgagees. The appellant now seeks to have it declared that he is entitled to priority over the other lien-holders. It is

apparent that if these parties had not been before the Circuit Court *its decree would not be binding in this particular*. That court had the right to adjudicate the question of priority between the several lien-holders because they had been made parties to the proceeding and had been duly served with process. The appellant now seeks to set aside the decree of the Circuit Court, and to have this Court adjudicate anew the question of priority between the several lien-holders, without bringing before this Court the parties whose rights are to be passed upon and settled by the decree now sought by appellant. The mortgagees had no interest in that question and cannot represent the absent parties. Of the persons interested in the matter of priority between the lien-holders, there is but one before the Court, to wit: the appellant. Upon what theory can it be held that this Court ought to proceed to consider the correctness of the decree of the Circuit Court on the question of the *relative priorities of the several lien-holders when none of them, save the appellant, would be bound by any decree we might enter*. The reasons demanding the enforcement of the general rule that a court should not proceed in a case, unless all of the parties whose interests will necessarily be affected by any decree that might be rendered are before the Court, are well stated in *Gregory vs. Stetson*, 133 U. S. 579 * * * .”

In the *Stetson* case the Supreme Court adopted the rule laid down by Story's Eq. Pl. Sec. 72, as to necessary parties in equity, and further said:

“The point was made in the court below and it is also pressed here, that Mrs. Pike being a non-resident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was therefore unnecessary to attempt to do so. The court below ruled against the complainant on this point, and we see no error in that ruling. The general question there involved has been before this Court a number of times and it is now well settled that notwithstanding the statute referred to and

the Forty-seventh Equity Rule, a Circuit Court *can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby.*"

So the fact that the presence in the case at bar of the Union Portland Cement Company, and other Utah citizens claiming liens, as defendant, would oust the court of jurisdiction, is no excuse for dismissing them, as they were indispensable parties.

The Court, therefore, having improperly dismissed indispensable parties did not thereby acquire jurisdiction and did not have jurisdiction at the time of the appointment of the receiver herein. If the receivership fails the Union Portland Cement Company acquires no status as an intervenor but must be brought in as a defendant. The rule allowing intervention because the Federal Court has taken possession of a fund or property to which an intervenor makes claim if it can be sustained at all under the bill in this case, can only be sustained if the Court at the time of the appointment of the receiver had jurisdiction. Obviously a court lacking jurisdiction because of an indispensable party whose citizenship is the same as complainant, cannot acquire jurisdiction by appointing a receiver and allowing such party to come in as intervenor. *All the cases allowing parties to intervene without regard to their citizenship hold that the receiver must have been properly appointed, i. e. that the court originally had jurisdiction of the case.*

As said in *Newton vs. Gage*, 155 Fed. Rep. 598:

"That the bringing in of a new party by crossbill or otherwise when the presence of such party as an original defendant would have defeated federal jurisdiction, violates both the constitutional and statutory requirement as to diverse citizenship is expressly held in *Shields vs. Barrow*, 58 U. S. 130, 15 L. Ed. 158 * * *

So in the case at bar the Court will not permit jurisdiction to be obtained by the transparent device of dismissing the objectionable party only to bring it back as an intervenor.

The jurisdiction of the original bill in this case depends upon diverse citizenship. There is no Federal question involved. *Therefore, the jurisdiction must have existed at the time of the appointment of a receiver.* If it were otherwise all that would be necessary to enable parties to come into the Federal Courts would be the bringing of a suit between two citizens of different States and the appointment of a receiver. Then upon the appointment of the receiver other parties, *absolutely necessary to the determination of the cause*, but not having the requisite citizenship, might be brought in by way of intervening petitions. Such is not the meaning of the rule that possession or sequestration by the Federal Court draws to it jurisdiction of all persons claiming an interest therein. The *jurisdiction of the suit* under which the Court obtained possession of the property must exist at the time when it acquires such possession. *The possession cannot be used to give the Court jurisdiction of the original action.*

The Union Portland Cement Company endeavors to align itself as a complainant by alleging that there is no controversy between it and the Corey Brothers Construction Company and no question of priority between them. If the Corey Brothers Construction Company admits this, and further, if both the complainant and the intervenor concede that their claim shall share pro rata, then under the case of *Pacific R. R. Co. vs. Ketchum*, 101 U. S. 289,

it would appear that they have a right to join as complainants.

It is to be noted, however, that while the intervening petition admits that no priority is sought it does in effect claim to be equal in rank to Corey Brothers' claim, and there is nothing appearing on the record to indicate that Corey Brothers concede this. If this be not conceded then the positions of the complainant and intervenor are antagonistic and the Union Portland Cement Company must be aligned with the defendants unless by the receivership they may come in without regard to citizenship.

Question of lack of jurisdiction may be brought to the Court's attention at any time and if jurisdiction is not present the Court must proceed no further, but must dismiss the suit.

Judiciary Act of March 3, 1875.

Morris vs. Gilmer, 129 U. S. 315-326 (32 L. Ed. 690).

Anderson vs. Bassman, 140 Fed. 10.

It appears from the record, and is admitted in complainant's brief, that in February, 1911, many months before the appointment of the receiver, the Court, on complainant's motion, dismissed the action as to several other defendants, aside from Union Portland Cement Company, also lien claimants whose interests are adverse to complainants. These lien claimants were necessary parties, and their dismissal was doubtless for the purpose of avoiding a fatal and obvious objection to the jurisdiction of the Court. We respectfully insist that a court cannot thus be given jurisdiction, and that a receivership, based upon proceedings so fatally defective,

cannot confer on the Federal Court a right to adjudicate as between citizens of the same State in the absence of any other ground of Federal jurisdiction.

The Court will not proceed to a decree in the absence of necessary parties. Nor will the Court act on the theory that it has jurisdiction, because of the appointment of a receiver, when the record shows that when the receiver was appointed, had the necessary parties been made defendants, the Court would thereby have been ousted of jurisdiction. In this case the parties, residents of Utah, dismissed out of the suit, were necessary parties, and the Court, therefore, had no authority to dismiss them out. Had this unauthorized dismissal not taken place the record would have plainly shown on its face lack of jurisdiction.

Coryon vs. Millaud, 19 How. (U. S.) 113.

Adams vs. Howard, 22 Fed. 656.

While there was no plea of non-joinder of indispensable parties, the record as it stands shows their existence, their unauthorized dismissal, and that their presence would defeat the jurisdiction.

IV.

The Complainant Is Estopped to Assert a Lien Superior to That of the Trust Deed Securing the Bonds From the Proceeds of the Sale of Which Complainant Has Been Paid Seven Hundred Thousand Dollars.

The question of priorities of liens under the Mechanic's Lien Laws of the State of Idaho are governed more or less by the provision of Section 5114 of the Revised Code.

Therein, among other things, it is said that a mechanic's lien is preferred

“to any lien, mortgage or other encumbrance of which the lien holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished.”

This brings us to a question of fact, as to whether or not the plaintiff had notice of the trust deed prior to the time work was commenced.

In this connection Mr. Speer, who had charge of the negotiations leading up to the contract, testified (Dft's Testimony p. 5, et seq.) that he first met Corey in Denver in the Spring of 1909. Corey was a bidder on a Denver project, and Speer says that he and Rosecrans (he was one of the engineers of the Arnold Company) were going to Boise on this Big Lost River project, and he told Corey about it, and Corey went west from Denver with him and Rosecrans. Speer says he went over the whole proposition about the plans for the handling this Big Lost River project, and told Corey that they wanted to get somebody to work on the project at the earliest time possible, and that Trowbridge & Niver would advance money for the project until they could get the bonds out. He says he explained to Corey that the bond issue was to be used for the paying for the work, and Trowbridge & Niver Company would want him, if he took the contract, to go slow on the construction work until such time as they could get out plenty of bonds. He says he told Corey that after the opening, when the bonds became available, he then could go as fast as he liked because “we could sell the bonds and get money faster than he could spend it, but until that time he would have to go slow.”

"At that time there were no funds available or in prospect for the project, except the proceeds of the sale of the bonds and except what Trowbridge & Niver would advance. I explained that fact to Mr. Corey and that the amount of money we could furnish would depend upon the condition of the bond market and how things worked at Denver." Again Speer testified: "In my conversation with Corey on the train, I told him that Trowbridge & Niver Company were to negotiate the sale of these bonds. The Big Lost River Irrigation Company was organized in every particular pursuant to the plan which I laid down to Mr. Corey. I carried out the plan of organization as outlined to Mr. Corey. The plan was outlined and that was subsequently just the way things were worked out."

"The estimates upon which Trowbridge & Niver Company made payments to Corey Brothers Construction Company were based upon the report of the field engineer, who would measure up the work and report to the Chicago office. In all these transactions I was acting on behalf of Trowbridge & Niver Company."

On cross-examination, the witness Speer testified (p. 20): "The reason I went into this matter with Mr. Corey was on account of his disappointment at Denver and his apparent anxiety to get the work. As I say, he rode on the train there, and we got acquainted with him. At this time there was no Lost River Company to make a contract, and Trowbridge & Niver would not want to make a contract without explaining all the circumstances" (p. 25). "The date of the first sale of the Big Lost River irrigation bonds was September 10, 1909, and altogether

I think we sold about \$1,350,000 of these bonds. The first deliveries of these bonds were made September 10, 1909, and prior to that date Trowbridge & Niver Company had advanced to the Big Lost River Irrigation Company \$209,516."

Mr. W. H. Rosecrans was a witness for the defendant, and he testified to coming out from Denver with Mr. Corey (Dft's. testimony p. 35).

"Corey asked me about the finances of this affair, and I explained the situation to him; that the Trowbridge & Niver people supplied the money for these projects from the sale of bonds; that the bonds were sold as rapidly as they could get them in, and that from the proceeds of these bonds the contractors were paid from time to time.

(p. 39) : "It was suggested to him in my presence that Trowbridge & Niver Company had taken over this project and were going to sell the bonds. I did not state to him on the train who was to sell the bonds, but had a further talk with him in Boise before Corey submitted his bid on the work. I explained to Mr. Corey that this matter would be handled just as it was subsequently handled; that Trowbridge & Niver would supply the money from time to time to carry on the work. I explained to him the system Trowbridge & Niver Company worked under was to sell the bonds on this project and from the sale the money would be supplied to the contractor. He wanted to know where the money had come from and I explained it to him."

(p. 41) : "Mr. Speer and I told Corey who would supply the money before the bonds were issued, not at the early part, but later on when it came to making a contract, I explained this much further to him."

It is true that Mr. Corey denies these conversations in part, but Rosecrans and Speer are so well corroborated by the whole circumstances and surroundings that it is inconceivable that these facts were not made known to Corey.

The trust deed was subsequently executed pursuant to this plan and the bonds were sold. The deed was executed on the 27th day of August, 1909, and was approved by the Attorney General on the same date, was acknowledged by the Trust Company officers on the 30th day of August, 1909, and filed for record the 4th day of September, 1909, and there are outstanding bonds to the amount of \$1,350,000, or thereabouts. (The exact amount is shown in record).

We then have this situation: The Construction Company, with knowledge of the fact that the trust deed is being issued to secure bonds for sale to procure money to pay for the construction work, undertakes the contract. The bonds are issued and sold, and practically \$600,000 or more of the proceeds of them is paid to the contractor. It seems in the teeth of the statute and likewise inequitable that the contractor, knowing the purpose for which the bonds were issued, should have a lien for his work superior to the lien of said bonds.

In *Dickerson vs. Colgrove*, 100 U. S. 580; 25 L. Ed. p. 619, the Court said:

“The estoppel here relied on is known as an equitable estoppel or an estoppel in pais. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations on which he acted. Such a change of position is sternly forbidden.”

In several cases in which the facts vary only in minor details from the present, the mechanic's lien claimant has been held estopped as against mortgagees.

In *West vs. Klotz*, 37 Ohio St. 420, there was the additional circumstance that the contractors had bought some of the bonds and later sold them, but the Court seemed to emphasize the fact that the contractors had received a large part of the bondholders' money in silence. The Court said at page 429:

"Klotz and Kramer are upon the plainest principles of equity precluded by their acts and agreements with the Steel Company from asserting such objections to the mortgage. They joined other citizens of Sandusky in accepting the proposition of the Steel Company to build a rolling mill; they subscribed to and paid for bonds issued by the Company and secured by the mortgage, and thereby induced others to do the same; they are beneficiaries under the mortgage; they received from the Steel Company in payment of more than two-thirds of their claim, the sum of \$57,000.00, which they knew had been advanced to the Steel Company on the faith that this was a valid mortgage; they sold to others a large portion of the bonds they received from the Company and it is fair to say that their purchasers relied on the mortgage as a security. Under such circumstances there can be no justice in saying that, because they were not fully paid, as they expected to be, out of the moneys so loaned to the Steel Company, they may, on discovering that the Company and its guarantors have failed, assert a mechanic's lien for the balance of their debt, and thereby defeat the mortgage, which everybody interested in believed to be valid until the whole sum of \$150,000.00 advanced on the faith of it, had been expended."

In *McGraw vs. Bayard*, 96 Ill. 146, one Hayes was indebted to the plaintiffs for some buildings. He made three trust deeds of the property to defendant Bayard to

secure a loan. This was done with plaintiffs' assent who expected that they would be paid out of the proceeds and also that Hayes would pay off certain encumbrances on another piece of property he had conveyed to them subject to his removing the encumbrances. The Court said, at page 156:

"In this case there really seems good ground to hold that the appellants are estopped from insisting that the lien of Bayard, the purchaser under the Smith trust deeds, is subordinate to their mechanics' liens."

Then after recounting the facts, the Court said, at page 157:

"By their conduct in this regard appellants substantially said to the public that their right to a mechanic's lien on the property was in fact waived; that when the liens on the property purchased by them from Hayes should be removed, their claim would be satisfied. And to secure the performance of that duty by Hayes, their note for \$6,000.00 was held by a third party and was not to be delivered until these encumbrances were removed. Bayard and his agents in the negotiation for the loan of this money upon these trust deeds, had a right from the circumstances to assume that this was the truth. Appellants thus put it in the power of Hayes to induce them to believe without misrepresentation that Bayard, by advancing the money, was acquiring a first lien on the property."

Bristol Goodson Elec. Lt. Co. vs. Bristol Gas El. Lt. & Power Co. 99 Tenn. 371; 42 S. W. 19, was a creditor's bill against an insolvent corporation. Bartlett, Hayward & Co. claimed a mechanic's lien for materials furnished while the other complainants were holders of mortgage bonds. The Court said in reference to the general question at page 380 of the Tennessee Report:

"Estoppel does not always rest on the intention of

the party to be affected by it, but is dependent rather, upon the reasonable or legitimate effect of his statement or conduct in the particular matter upon the course of other persons. He will not be allowed to assert his lien to the prejudice of persons whom he has induced to believe that his debt has been satisfied, or that he will claim no lien, and who, in that belief, have purchased property on which the lien rests or invested in bonds covered by mortgage thereon. As to such persons, he is absolutely concluded by his statements or conduct, though in fact contrary to the real truth of the matter; and in this connection, conduct includes both affirmative and negative action. Silence is sometimes as significant as a positive assertion, and, when of such import, is equally conclusive in favor of the party influenced thereby."

At page 385 the Court said:

"Epitomized the facts are as follows: Bartlett, Hayward & Company suggested the execution of the mortgage and the issuance of bonds inconsistent with and antagonistic to their claim of lien, consented to the consummation of that scheme thereafter in the hope of collecting their debt from the proceeds, gave aid to the Company in efforts to sell \$50,000.00 of the bonds, and the Company ultimately sold them for value to innocent persons, who are not shown to have been influenced directly by the representations, statements of assurances of Bartlett-Hayward & Company. This makes a complete case of estoppel. Having helped to bring about the bond issue, and encouraged the Company to put \$50,000.00 of the bonds on the market, Bartlett, Hayward & Company will not be permitted to assert their lien to the injury of the purchasers, though they may not have directly influenced them to buy. Encouragement to the Company with all the facts before them, made Bartlett, Hayward & Company responsible for the Company's action; and the Company by selling first mortgage bonds, represented the property as free from prior encumbrances. * * * The meaning of that representation so far as Bartlett, Hayward & Company are concerned, was that they had no prior lien on the

property, and to that extent they are bound as between themselves and the purchasers of the bonds."

For other cases see:

Com. Bldg. & Loan Assn. vs. Travette, 160 Ill. 390.

Hughes vs. McCasland, 122 Ill. App. 365.

Phillips vs. Gilbert, 2 McArthur (D. C.) 415.

Acker vs. Massman, 12 Ind. App. 696; 41 N. E. 77.

Spargo vs. Nelson, 10 Utah, 274; 37 Pac. 495.

The rule so clearly stated in the above cases shows that Corey Bros. Construction Company are estopped to claim a mechanic's lien against the holders of these mortgage bonds. Corey Brothers stood by in silence and allowed these defendants to advance money in the belief that there was no prior encumbrance on the property, although Corey Brothers knew all the facts. This was done with the intention that defendants should act and induced them to act to their detriment, and Corey Brothers have reaped the benefit of that action to the extent of \$700,000.00 which they have received in payment. How, then, can it be said that they should not in equity and good conscience be estopped to claim this lien?

V.

Irrigation Works Constructed Under the Carey Act Are Not Subject to Mechanic's Lien Laws.

It is elementary that works of a public character are not subject to the mechanic's lien laws, unless the statute shows clearly an intention on the part of the Legislature to include such works within the scope of the statute.

The Idaho statute under which appellees claim their right to lien, reads as follows:

"Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of, any mining claim, building, wharf,

bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, sub-contractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter: *provided*, That the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this chapter."

Sec. 5110, *Idaho Revised Codes*.

This statute was adopted in 1887, being Section 5125 of the Revised Statutes of 1887. The amendments that have been added since its first adoption have not extended the scope of the statute, except by including the word "dike," and by making certain changes in the procedure and in the details for perfecting and enforcing the lien.

Section 5125 of the Revised Statutes of 1887 was copied verbatim from the mechanic's lien laws of California, adopted in 1872, being Section 1183 of the California Code of Civil Procedure, adopted in that year. The California statute and the Idaho statute as originally adopted in 1887 read as follows:

"Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct, to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each

respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, but the aggregate amount of such liens must not exceed the amount which the owner would be otherwise liable to pay."

The scope or substantial part of the statute has not been enlarged by new legislation in the State of Idaho, but it is limited to the identical structures which were intended to be included therein at the time of its first adoption in California in 1872, and the question here is, did the Legislature of California in 1872 and the Legislature of the State of Idaho in 1887 intend to include within the statute reservoirs, dams and irrigation systems constructed under the supervision of the State, pursuant to Section 4 of the Act of Congress, approved August 4, 1894 (28 Stat. 422), and the amendment thereto contained in Section 1 of the Act approved June 11, 1896 (29 Stat. 413-434), and Section 3 of the Act approved March 3, 1901 (31 Stat. 1188). The statutes above referred to constitute the legislation commonly referred to as the "Carey Act." These statutes and the subsequently enacted State legislation to carry out the provisions of said Acts of Congress were enacted many years after the mechanic's lien statutes were adopted.

At the time the mechanic's lien statutes were enacted the only "ditches" known to the law were such as were constructed by private parties for mining or irrigation purposes, and primarily for a private use. There was no authority under the law at that time for the construction by public authority or under public supervision and control of large irrigation systems of the kind and character now before the Court.

The courts have repeatedly held that the term "road" as used in the lien statutes does not include *public* roads or highways. Neither does it include *railroads*. They have likewise held that the term "bridge" as used in such statute does not include *public* bridges, or bridges on highways, or *railroad* bridges, and that the term "buildings" does not include *public* buildings or buildings forming a part of the plant of public service corporations required by such corporations in the discharge of their duties to the public, or in carrying out public franchises. They have likewise held that the term "any other structure" does not include *public* buildings or structures, or buildings of public service corporations essential to the discharge of their public duties. By parity of reasoning, it necessarily follows that the term "ditch" as used in the lien statutes does not include *public* ditches, or irrigation systems constructed by the State or under the supervision and control of the State for a public use.

In view of the importance of the subject, we deem it proper to submit at some length, the authorities bearing on the question.

Courts have uniformly declined to construe the mechanic's lien laws to have any application to buildings essential to the operation of the plants of public service corporations, except where such corporations were expressly and in clear and unmistakable language included in the act.

The Supreme Court of Wisconsin in *Chicago & N. W. Ry. Co. vs. Forest County et al.* 95 Wis. 89; 70 N. W. 77, says:

"The franchises and rights of a *quasi* public corporation, owing important duties to the public, and

the property, vested in it necessary for their use and enjoyment, and the accomplishment of the purpose for which it was created, constitute an entirety, and in the absence of special statutory authority, are not subject to be seized and sold on execution, or for mechanic's liens, nor on tax process (citing many authorities)."

And the same Court, in *Chapman Valve Mfg. Co. vs. Oconto Water Co.* 89 Wis. 264; 46 Am. St. Rep. 830, in declining to enforce a mechanic's lien against the water company, among other things, says:

"Nor can the plant be sold separately from the franchise to operate it. The franchises and corporate rights of the Companies, and the means vested in them, which are necessary to the existence and maintenance of the objects for which they were created, are incapable of being granted away or transferred by any act of the Company itself, or by any adverse process against it, unless it is authorized by a statute." (Citing cases.)

We quote from the syllabus of the same Court in the case of *Pittsburg Testing Lab. vs. Milwaukee Etc. Co.* 110 Wis. 634; 86 N. W. 592; 84 Am. St. Rep. 948:

"Under the general mechanic's lien law, no lien attaches to a particular part of the railroad, or property of any other *quasi*-public corporation, essential to its operation and maintenance for public purpose."

It quotes with approval from *People vs. Herkimer*, 4 Cow. 348, as follows:

"When a statute in general, and any prerogative right, title or interest would be divested or taken from the king, in such case he shall not be bound, unless the statute is made by express words to extend to him."

The Supreme Court of Pennsylvania, in *Plymouth Ry. Co. vs. Colwell*, 39 Penn. St. 337; 80 Am. Dec. 526, says:

“As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by exercise of the delegated power of eminent domain, the company holds it entirely exempt from levy and sale; and this on no ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act than can a creditor by legal process; but the exemption rests on the public interests involved in the corporation. Though the corporation in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation. The only remedy which the law allows to creditors against property so held is sequestration. *Susquehanna C. Co. vs. Bonham*, 9 Watts & S. 28 (42 Am. Dec. 315). And that remedy is consistent with corporate existence, whilst a power to alien, or liability to levy and sale on execution, would hang the existence of the corporation on the caprices of the managers or on the mercy of its creditors. For the corporation would cease to exist for the purposes of its institution, when its means of subsistence were gone. It might still have a name to live, but it would be only a life in name. A railroad company could scarcely accomplish the end of its being, after the ground on which its rails rest had been sold to a stranger. If such is in general the law of corporate tenures which are essential to corporate functions, it is peculiarly the law of this case where Freedly took his title from the sheriff, expressly subject to the franchises of the Plymouth Railroad Company.”

The same rule was long ago announced by the Supreme Court of the United States in declining to apply to a railroad company the lien laws of North Carolina in the case

of *Commissioners of Buncombe County vs. Tommey*, 115 U. S. 122; 29 L. Ed. 305.

The Supreme Court of Pennsylvania in *Foster vs. Fowler*, 60 Penn. St. 27, in considering a case where a lien was claimed against the pumping engine and engine house of the water company, said:

"Most people acquainted at all with corporate action, understand that corporations, other than municipal, which are purely public, naturally divide into public and private corporations; that is, into those that are agencies of the public directly affecting it, and those which only affect it indirectly, by adding to its prosperity in developing its natural resources, or in improving its mental or moral qualities. Of the former, are corporations for the building of bridges, turnpike roads, railroads, canals and the like. The public is directly interested in the results to be produced by such corporations, in the facilities afforded to travel and the movements of trade and commerce. It is well settled that this use is not to be disturbed by the seizure of any part of their property essential to their active operations, by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking, to accommodate the public."

The charter of the company in that case was quite similar to that of a Carey Act company, and provided for the eventual transfer of the water works system to the municipality, and, referring to that feature of the case, the Court said:

"It is thus not only a public corporation, but is subject to become municipal property."

The Court then quotes with approval the rule laid down by the Court in *Susquehanna Canal Co. vs. Bonham*, 3 W. & S. 27, where it is said:

"The privileges granted to corporations to construct turnpike roads, canals, etc., are conferred with a view

to the public use and accommodation, and they cannot voluntarily deprive themselves of the lands and real estate, and franchises which are necessary for that purpose; nor can they be taken from them by execution and sold by a creditor, because to permit it would defeat the whole object of the charter, by taking the improvements out of the hands of the corporation and destroying their use and benefit.'

"As a mechanic's lien is the foundation for process of sale, we should yield the principle thus clearly stated, by holding it applicable to erections of works of the description we are considering, having settled its object and use to be public. We think the remarks of Lowrie J., in *Williams vs. The Controllers*, 6 Harris 275, is in point here, '*that where there can be no execution, there can be no action * * **'".

In *Guest vs. Lower Marion Water Co.* 142 Pa. 610; 12 L. R. A. 324, the question involved was almost identical with the one at bar. Plaintiff there was seeking to establish a mechanic's lien on the property and franchises of a public water works company supplying a municipality, which had an option to purchase at the end of twenty years. Plaintiff argued the Act of 1870, which made the property and franchises of corporations subject to sale on execution, had done away with the rule that the essential property of a public service corporation was not subject to mechanics' liens. The Court, after quoting from the statute, said:

"It is obvious that such comprehensive process was not designed for the collection of a judgment founded on mechanic's lien. This lien is statutory, and in the procedure for its enforcement the judgment and execution are restricted to the property bound by it. It is the policy of the law to keep intact the property belonging to and essential to the operations of a public corporation, and hence its creditors will not be allowed to divide such property and sell parts of it.

It would be a signal abandonment of this policy and it would invite a division of the property to allow it to be sold on mechanic's lien process. This could not be done prior to the Act of 1870, and we discover nothing in that which authorizes it."

The leading case to the effect that railway property is not lienable is *Commissioners of Buncombe Co. vs. Tommey*, 115 U. S. 122, a case in which mechanic's lien claimants contested the priority of holders of mortgage bonds. After discussing the public nature of railroads, now universally admitted, the Court said:

"Such being the relation existing in North Carolina between these corporations and the public, it should not be presumed that the Legislature intended to subject them to the operation of the ordinary lien laws, enacted for the benefit of those performing labor and furnishing material in the construction, repair or improvements of what a statute of 1870 designates as buildings, or who performs labor upon lots, farms and other property, belonging to private persons and having no connection with public object. A different construction of the statute would enable parties having liens for the amount within the jurisdiction of Justices of the Peace, to destroy the public highway and defeat the important objects which the State intended to subserve by its construction. No such intention should be imputed jects. A different construction of the statute clearly require it to be done."

Another early case to the same effect is *Dunn vs. North Missouri R. R.* 24 Mo. 493, where the Court said:

"After the immense responsibility the State has assumed in building this and other railroads for the public use and convenience, it would be unreasonable to suppose power remained in any individual to deprive the public of the benefit contemplated by them. A lien with power of enforcing it by execution would enable the lien-holder to subject a portion of the road affected by it to execution, and the execution to be

effectual must confer a title to the purchaser under it. A power to effect by liens to be enforced by executions on public buildings might put it out of the power of the State to possess any public edifices. Would a mechanic or laborer under the lien law have the right to a lien for materials or services furnished in building a capital for the State? Shall buildings intended for the public benefit be taken from the public so soon as they are completed, or their completion be prevented by a sale of them, and the State be forever debarred of buildings for the accommodation of her agents?"

This case has been followed in the later Missouri cases of:

Schulenberg vs. Memphis C. & N. W. R. R. 67 Mo. 442.

Skranka vs. Rohan, 18 Mo. App. 340.

Pennsylvania first applied this rule to turnpike roads in *Ammant vs. New Alexandria & Pittsburg Turnpike*, 13 Serg. & Rawl, 210, and to a canal company in *Susquehanna Canal Co. vs. Bonham*, 9 Watts & Serg. 27.

The same rule is laid down in *Elliott on Railroads*, Last Edition, Section 106., and *Thompson on Corporations*, Last Edition, Section 3395.

In some cases it was said that to hold otherwise would be contrary to public policy, while in others the rule is based upon the fact that the ordinary methods provided by statute for the enforcement of a lien cannot be pursued against public property, and, there being no mode of enforcing the lien, it cannot exist.

First Nat. Bank of Idaho vs. Malheur Co. 30 Ore. 420; 35 L. R. A. 141.

20 Am. & Eng. Encyc. of Law, 296, and cases cited in notes 6 and 7.

Phillips on Mechanic Liens, Section 180, distinguish-

ing between corporations to which the mechanic's lien laws do not apply and corporations to which such laws do apply, says:

"Of the former are corporations for the building of bridges, turnpikes, roads, railroads, canals, and the like. The public is directly interested in the results to be produced by such corporations, in the facilities afforded to travel and the movement of trade and commerce. In some states it is well settled that this use is not to be disturbed by the seizure by creditors of any of their property essential to their active operation. This direct benefit to and accommodation of the public very clearly distinguish this class of corporations from the second, viz., private corporations, or those in which the public is but indirectly interested, such as mining and manufacturing or coal and iron companies, etc., or libraries, literary societies, schools, and the like. Whether they progress or cease the public is not directly affected; and hence liens are enforceable against them without, as a general thing, without any regard to the effect upon their operations. But a corporation for introducing water into a town for the accommodation of its inhabitants is a public corporation, and its buildings, etc., necessary for carrying on its operations, and not subject to this lien. Although railroad companies, in some respects, resemble private corporations, yet, as they are organized for the public benefit, the state takes a deep interest in them, and regards them as matters of public concern. They are looked upon by the laws as corporations endowed with capacities for the promotion of the public good and for the diffusion of advantages to the state as a body politic. * * *

"It is said that it is better to suffer a mischief which is peculiar to one than an inconvenience which may prejudice many. This, however, is no mischief to the mechanic. He would subject the public to this great inconvenience, not because the public is in debt to him, not because he has not the same remedy for his debt that every other member of the community has, but that he may enjoy the privilege conferred on no other class of society. Therefore where work

and labor are performed upon, or materials furnished for the line of a public railroad, built under authority of the state for public use, and by it contributed to, it is protected from the mechanics' lien. Public bridges are not subject to the mechanics' lien law which secures liens on bridges for work done thereon, or for materials furnished for their construction. A public bridge is a common highway. * * * Because bridges which are public highways can not be subject to the liens of mechanics, it does not follow that there may not be private bridges which will be subject to them." (Our italics.)

In discussing the right of a corporation holding a public franchise to dispose of such franchises or the property required in carrying on its public duties, the same author in Section 180, says:

"The right to erect a bridge, and to exact toll from passengers crossing it, is a franchise that can be granted only by the State. That right is personal, and cannot be transferred without express authority of law. In conferring the privilege, regard is had to the ability of the applicant to build and keep up the bridge; and, as personal considerations may influence the grant, the franchise of common right is not transferable."

And in Section 181 the author says:

"The decisions of many states undoubtedly establish that as the interest of the public in the administration of the public franchise survives the grant by which it is made the property of the corporation or an individual, and is paramount to the right of the creditors of the grantees, it can not be taken in execution and sold for the payment of debts. This is true, not only of the franchise itself, as, for instance, of the right to carry passengers and freight on a railroad, but of everything necessary to its enjoyment, and without which it cannot be exercised."

Boisot on Mechanics' Liens, in discussing the inapplicability of the Mechanics' Lien Laws to corporations of a public character, says (Section 188):

"Railroads are public highways, and it would be highly injurious to the public to have them interfered with. It has, therefore, been held with almost complete unanimity that the mechanics' lien laws will not be extended by implication so as to include railroads. Thus a statute granting liens on 'buildings or other improvements' does not include railroads. Neither does a statute giving liens on 'every buildings and every lot, farm, or vessel, or any kind of property not herein enumerated', nor one giving 'a lien for labor such as ditching, building levees,' etc., nor one giving a lien on 'houses, buildings, fixtures, and improvements and the land necessarily connected therewith, not exceeding fifty acres,' nor one giving a lien on any house, bridge, or other structure." (Citing many cases).

The same author, in discussing the exemption of public property from lien, Section 209, says:

"Public bridges are not subject to mechanics' liens, even under statutes that expressly grant a lien on bridges * * * and the property of a water company organized under a legislative charter which gives it the right of eminent domain, protects it from competition, compels it to furnish water at reasonable rates, and provides for the ultimate purchase of its works by the municipality, is exempt from mechanics' liens since such a company is a public corporation."

Dillon in the last edition of his work on Municipal Corporations, Volume 3, Section 993, in discussing the inapplicability of mechanics' liens to buildings and works of a public character, says:

"Thus, county bridges, school houses, court houses, and other public buildings which cannot be sold under an execution, cannot, without a plain statute to that effect, be sold on foreclosure of a mechanics' lien; it is only such property as can be sold under a judicial process that is subject to such lien. Laws creating liens in favor of mechanics are enacted with

reference to that class of property which may be so sold." (Citing many cases.)

The Supreme Court of Nebraska in *Sherman County, Etc. Co. vs. Drake*, 65 Neb. 699; 91 N. W. 512, had before it a case where an ordinary irrigation company had completed a portion of its canal. The lower part of the canal consisted of a flume constructed for the purpose of carrying the water over a depression in the surface of the land to the extension which had not yet been undertaken. The flume as constructed was of no value in connection with the works already constructed and which had been used for irrigation purposes. Owing to deterioration and damage to the canal the system fell into disuse and had apparently been abandoned. The Company was unable to pay its obligations and a judgment creditor levied upon the flume. The Company brought suit to enjoin the sale, claiming intention of proceeding with the further construction and extension of its system. The trial court found that the company was insolvent and that the company had abandoned the intention of completing its canal over that part of the right of way which had been levied upon. The Supreme Court in reversing the decision said:

"In our opinion the case is ruled by the decision of this court in *Bridge Co. vs. Means*, 33 Neb. 857, 51 N. W. 240; 29 Am. St. Rep. 514, in which it is held, in accordance with the general views of judicial authorities, that, in the absence of statutory enactment, the property of *quasi* public corporations, like the plaintiff, cannot be seized and sold upon process in actions at law. If the first of the facts found by the court constitute an exception, it would, in effect, abolish the rule, because the issuance of the execution, and its return *nulla bona*, as was done in this instance, would establish the fact of insolvency and justify the levy. Abandonment or non-

user of corporate property and franchises is, under some circumstances, a ground of forfeiture, which may be enforced at the suit of the state, but it is not, of itself, a forfeiture or surrender, nor does it deprive the public of its interest, which, in a proper case, the state may preserve by resuming the franchise and bestowing it upon some one capable and disposed to effectuate the object for which it was created."

That the irrigation system upon which appellees have been decreed a lien is decidedly of a public character, and that the Big Lost River Irrigation Company is a public service corporation of such character that the rules laid down by the foregoing authorities apply and so operate as to deny the right to a lien, seems to us beyond question.

The record shows clearly that the assets of the Irrigation Company consist of the following rights and property:

(a) Contract, dated May 27, 1909, between George S. Speer and the State of Idaho for the construction of the irrigation system, which contract was, with the approval and consent of the State of Idaho, assigned to the Big Lost River Irrigation Company.

(b) A partially constructed irrigation system, constructed under the said contract and pursuant to the acts of Congress hereinbefore mentioned and the laws of the State of Idaho, enacted pursuant to and for the purpose of carrying out the provisions of said Acts of Congress, being Sections 1613 to 1634, inclusive, of the Revised Codes of Idaho.

(c) An equity in settlers' contracts, aggregating \$1,950,148.19, of which there is on deposit with the appellants, as trustees, contracts of the par value of \$1,836,816.27 as security for the bonds issued under the trust

deeds, under which appellants are trustees. Of the remaining settlers' contracts \$101,851.92 par value, have been pledged by the Irrigation Company as collateral security for a promissory note, sometimes referred to as the Bradford and Starr note (Record, p. 354).

(d) An equity in the certificates of stock in Lost River Water Company, issued to settlers as evidence of their interest in the irrigation system, and by the settlers endorsed in blank and re-assigned to Big Lost River Irrigation Company as additional security for the deferred payments payable under the settlers' contracts, and by the Irrigation Company in turn deposited with appellents, as trustees, for additional security for the bond issue (Record, pp. 355, 565).

The State contract for the construction of the irrigation system is in the nature of a *franchise*. It is not a "ditch" or "structure" within the meaning of the mechanic's lien laws. On what theory the Court held the lien to attach to the contract the record does not show, and the opinion of the learned District Judge is silent on the point. It is ordered to be sold under the lien foreclosure, and to be transferred and conveyed to the purchaser at the foreclosure sale. On what authority or for what reason the record does not say. We apprehend that the only reason that could be assigned would be that this franchise or State contract is an "appurtenance" to the canal or works constructed by Corey Brothers, and for which material was furnished by the Union Portland Cement Company. But there can be no authority for holding such a contract or franchise an appurtenance. Such contention seems contrary to the elementary principles of the law of appurtenances.

We shall discuss later the question as to whether the State contract is assignable and transferrable without the consent of the State, and we pass now to a consideration of whether the irrigation works referred to are of such a public character as to bring them within the doctrine of the authorities cited above.

The Acts of Congress under which the works were constructed grant to the State a million acres, or as much thereof as the *State* may cause to be irrigated, reclaimed and occupied by actual settlers; the State is by these Acts "authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement." (28 Stat. 422).

The Federal Government recognizes no one but the State as the authority authorized to provide irrigation works for the reclamation of these lands. Section 1615 of the Revised Codes of Idaho (set forth in the appendix of brief) provides for the filing by the irrigation company desiring to contract with the State for the construction of such works, of a proposal with the State Board of Land Commissioners. The proposal must be in accordance with the rules of the Board and the regulations of the Department of the Interior, and it must show that application for a special permit to appropriate water for the irrigation of such lands has been filed in the office of the State Engineer. It provides that the water rights proposed to be sold to the settlers shall embrace "*a proportionate in-*

terest in the canal or other irrigation works, together with all rights and franchises attached thereto."

Section 1630 (appendix to brief) provides for free rights of way over the State lands for such irrigation works. The contract to be entered into by the State is required to contain certain stipulations and terms, reserving to the State control over the construction of the works so as to protect well the interest of the public against defaults on the part of the contracting company—the Big Lost River Irrigation Company in this case. The compensation which the irrigation company receives for the construction of the works is the franchise or right—exclusive in its nature, to sell water rights upon the terms contained in the State contract to all settlers on the lands segregated from the public domain under the said Acts of Congress.

The contracting company is not the owner of the works. The law does not require that it shall hold title to any of the structures or rights of way, or even to the water rights. It only requires that it shall have filed application with the State Engineer for a permit for sufficient water to reclaim the lands under the system. The free rights of way which the State grants or furnishes for such works do not become the property of the contracting company to be sold or disposed of as it sees fit. If it holds any title whatever to the works or water rights it is merely as Trustee during construction and until the water rights are disposed of to the settlers according to the terms of the State contract. The irrigation works are dedicated for the irrigation of the lands segregated under the Carey Act, and each settler receives under the law a

proportionate interest in all the works and in "all the rights and franchises attached thereto." Such interest the Company must agree to furnish him. ((Section 1615, Idaho Revised Codes). Such interest he must have before he can enter the land. (Section 1626). And such interest he must hold when he makes his final proof. Hence, when all the lands have been entered there is no interest left in the irrigation or contracting company, except the lien on the land and appurtenant water rights for the unpaid balance of the purchase price.

The contract with the State, to better carry out the provisions of the law, and to assist the settlers in taking over the system, provides (Record, pp. 471-474) that the contracting company in the case at bar should cause to be organized an operating company, to be known as the Lost River Water Company, Limited, to which corporation the irrigation works here involved should be conveyed; that the Lost River Water Company should be organized on a basis that each settler should receive one share of stock for each acre of land entitled to water from said system, and at the time an entryman purchased a water right the contracting company was required to issue to the purchaser one share of stock in the Lost River Water Company "for each acre of land entered or filed upon;" and upon the completion of the works, or whenever it was certified by the State Engineer that certain portions of the irrigation system were sufficiently completed for the delivery of water to the settlers, such works should be transferred to the Lost River Water Company for operation; and the management and control of the irrigation system, so far as it was possible under the law to vest it in any

one other than the individual settlers, was placed by the State contract in the Lost River Water Company. That corporation under the law holds the title in trust for the settlers or water users who are stockholders in the corporation.

State vs. Twin Falls Canal Co. 21 Ida. 410, 121 Pac. 1039.

In the above case the Idaho Supreme Court in construing the State statute, says:

"Said statute contemplates that each owner of a water right has a proportionate interest in said entire irrigation works."

Speaking of the operating company, the Court also says:

"The canal corporation was organized under the supervision of the State for the purpose of carrying out a certain duty resulting from a trust * * *"

Again the Court says:

"The canal corporation is not one organized for profit, but is one organized really for the purpose of performing a public duty. The stock of that corporation represents the right to the water, and a refusal to deliver the stock amounts to a refusal to deliver water, and a refusal to perform the public duty for which the corporation was organized. * * *"

It also said:

"The express purpose of said corporation being to receive from the said land and water company the title to the canals, dams and franchises of said last named corporation, and to manage them for its shareholders."

In the case at bar the Big Lost River Irrigation Company could not transfer the works to any one other than the Lost River Water Company without the consent of the State. That the works are decidedly of a public character, much more so than railroads and corporations furnishing water to cities and towns, can not be denied.

If mechanics' liens can attach to such works, the State in its undertaking to reclaim the desert lands within its boundaries cannot in advance of the building of such works lay out a definite course of procedure, with any assurance that it will be carried out. Any laborer, and any materialman, contractor or sub-contractor failing to receive his pay promptly or dissatisfied with the compensation received, or the estimate of work done, can cloud the title and entangle the system in litigation, the effect of which is inevitably to delay the completion of the works and the delivery of water to the settlers. The public inconvenience and embarrassment that must necessarily follow the application of the mechanics' lien laws to such works can readily be imagined. The mechanics' lien laws should not be construed to apply to such works unless the legislative intent is so clearly apparent that no other conclusion is reasonably possible.

The unfortunate delays which have resulted in the case at bar, and the hardships which they have worked upon the settlers and the great embarrassment that has resulted to the State, flow directly from the attempt to enforce appellees' liens.

In the opinion of the learned District Judge who decided the case, reference is made to the case of *Nelson-Bennett Company et al. vs. Twin Falls Land & Water Company*, 14 Idaho, 5; 93 Pac. 789, and the case of *Pacific Coast Pipe Company vs. Kings Hill Irrigation & Power Company*, not reported but decided by the District Court for the District of Idaho in December, 1911. We submit, however, that those cases are not controlling. The Pacific Coast Pipe Company case was based upon

the Nelson-Bennett case. In both cases the controversy was between the irrigation company and the lien claimant, and the Court did not attempt to determine what interest, if any, the irrigation company had in the irrigation works that could be sold upon a foreclosure of the lien.

In the case at bar appellants have a mortgage upon all the property of the irrigation company—the mortgage being expressly authorized by the contract between the contracting company and the State, and it was approved by the Attorney General, as provided in said contract; and in addition to having a general mortgage upon the irrigation system, water rights and other rights and franchises of the irrigation company, there have been pledged with the Trustees, settlers' contracts, or the amount due under such contracts, to an amount aggregating over \$1,800,000.00 as security for the bonds issued. Appellants therefore have a two-fold lien or interest in the irrigation system and works decreed to be sold in this case:

(a) They have a general mortgage upon the unsold water rights and unsold capacity in the irrigation system; and,

(b) They have pledged with them the settlers' contracts which constitute a mortgage upon the undivided, proportionate and individual interest in the irrigation works, water rights and franchises sold to the settler by the irrigation company.

And it becomes necessary in this case for the Court to determine definitely whether the water rights and individual and proportionate interests in the system, sold to the settlers by the irrigation company, are subject and sub-

ordinate to appellees' liens, and also whether the Company has such interest in the unsold capacity of the works and in the remainder of the water rights that a mechanic's lien can attach thereto. These matters were not determined in the cases above referred to, and were not passed upon by the District Court in this case. In the Nelson-Bennett case the Court said:

"If it be conceded by appellant that it has no interest in or title to any of this property, and no right of possession thereto, then we grant that the respondent can sell nothing at a foreclosure sale. This lien extends only to the interest, claim and right of the Twin Falls Land & Water Company. If it has no interest therein, it cannot suffer by foreclosure sale under this lien. If it has an interest therein, that interest may be sold at foreclosure sale * * *. In fact, however, the claim here made is only commensurate with the interests and rights of the appellant company. To that extent the action may be prosecuted and no further."

The District Court in the case at bar on this point, said:

"If, as argued, most of the water rights have been sold, and such rights are exempt from the plaintiff's lien, and if therefore a lien upon the canal system is upon an empty shell, of little or no value, and if the State is not bound to recognize the purchaser at a foreclosure sale as the successor in interest to all of the construction company's rights, then, to be sure, there is need for solicitude on the part of the plaintiff, but not on the part of the mortgagee." (Record, pp. 651, 652.)

This method of disposing of a question may be convenient, but we submit that the conclusions reached and quoted above are inherently unsound, and such argument seems to us more plausible and specious than fundamental or convincing. These appellants have a right to demand that the title to the property upon which they hold a mort-

gage be not beclouded and tied up indefinitely in litigation resulting from the foreclosure of mechanics' liens upon an assumed interest of the mortgagor, which the Court upon further litigation may find either does not in fact exist or is not a lienable interest.

The Court in this case but laid the foundation for innumerable suits and postponed for future determination in such suits the question of whether the debtor has a lienable interest in the property ordered to be sold. It was clearly the duty of the Court in this case to determine whether the Big Lost River Irrigation Company had a lienable interest in the irrigation system covered by appellants' mortgage. It had no right to defer that question and order the property sold at judicial sale, leaving it to the prospective purchaser at such sale to determine at his peril whether he acquires anything or simply "an empty shell, of little or no value." Deferring a decision upon that question, with the suggestion that in the end it may develop that there was no property to which the lien could attach, does not tend to inspire competitive bidding, and the only effect of it is to inform the bidder in advance that he is only purchasing a law suit.

The learned District Judge also stated (Record, p. 652) that:

"It is of no consequence that Carey Act projects were unknown when the lien statutes were enacted. Neither were railroads and telegraph lines known when the Constitution of the United States was adopted, but such instrumentalities are not therefore exempt from the operation of the interstate commerce laws of the Constitution."

The sweeping and comprehensive argument could be directed with equal force against the decision of the United

States Supreme Court in *Buncombe County vs. Tommey*, 115 U. S. 122; 29 L. Ed. 305, in which case the Court held that the lien laws of the State of North Carolina did not apply to a public service corporation like a railroad company. The language of the North Carolina statute, then before the Court, was as comprehensive, in so far as it related to the question before the Court in that case, as is the Idaho statute in relation to the question now before the Court.

In the Nelson-Bennett case the Idaho Supreme Court was not concerned with the rights of the mortgagee. The Court said:

“In fact, however, the claim here made is only commensurate with the interest and rights of the appellant company. *To that extent* the action may be prosecuted *and no further.*” (Our italics.)

Accepting that statement at its par value, it necessarily follows that the lien could not attach to the interests which had been sold to the settlers, and upon which they in turn gave mortgages as security for the deferred payments, which mortgages (in this case called settlers' contracts) have been deposited with appellants as security for the bonds.

The Court in this case does not distinguish in the application or enforcement of the lien between the unsold capacity and the unsold water rights in the system, and those which have been sold to the settlers and entrymen. Appellant's mortgage is a direct lien only upon the unsold capacity and unsold water rights, or upon what the irrigation company has not sold to the settlers, and it only indirectly affects the interest in the system owned by the settlers. Such interest, as heretofore stated, has been mortgaged by the settlers as security for the de-

ferred payments of the purchase price, and such individual or settlers' mortgages or contracts have been deposited and pledged with appellants under their mortgage as additional security for the bonds. The Court by failing to distinguish between these decidedly different interests has thrown a cloud upon the title and water rights of some 700 or 800 settlers who are not parties to the suit. It is equivalent to foreclosing a mortgage without making the owner of the land a party to the suit.

The contracts or mortgages given by the settlers on their individual interests in the system show clearly that the Big Lost River Irrigation Company has no interest whatever in the water rights and undivided interest sold, except as mortgagee under the settlers' mortgages or water contracts (see defendants' Exhibit 77, record pp. 558-566, and State Contract, record pp. 468-474).

The Court by its decree has directed the irrigation system to be sold without making any provision for protecting the rights of either the settlers or appellants under the contracts pledged with appellants, and the effect of this decree must necessarily be to promote vexatious litigation and involve the settlers, the purchaser of the system at the Master's sale, and appellants in numerous suits to determine their respective rights and interests.

The statement of the Court in its opinion "that neither the State nor the purchasers of water rights are before the Court, and therefore such rights as they may have will not be affected by foreclosure decree" is of no substantial benefit in view of the unqualified and positive provisions of the decree that the Master shall sell the *entire* irrigation system and all the water rights connected therewith. If

such a rule is to prevail there is nothing left of the doctrine of indispensable parties. The Court should not enter any decree which must from necessity becloud the title of persons not before the Court, and result in expensive litigation to them in order to determine their rights as against appellees' liens and the interest acquired by the purchaser at the Master's sale.

We desire also to call the Court's particular attention to the fatal error of not making the Lost River Water Company a party to the suit. It was provided in the State contract that the Lost River Water Company should be organized for the purpose of taking over the operation and management of the irrigation system (Rec. 471-4). The record shows it was organized for such purpose. (Rec. 570-4), and that every settler and purchaser of a water right was given a share of stock in that company for each acre of land for which a water right was purchased (Rec. 354-6), and that such stock entitles the purchaser to a proportionate part of the water in the irrigation system here involved. By attempting to enforce the liens of appellees the Court abrogates all the provisions of the State contract and of the individual settlers' contracts pertaining to the Lost River Water Company, and it does so without the presence in court of that company or of the settlers affected by that portion of the decree.

The procedure, which the State required to be carried out in the sale of water rights, was as follows:

The Big Lost River Irrigation Company was required to sell water rights without preference or partiality, other than that of priority of application (Rec. 467), upon a form of contract approved by the State. Such contract provided that each purchaser should receive a certificate

of stock in the Lost River Water Company for as many shares as he purchased water rights. Such certificate, if the water right was not fully paid for, should be endorsed in blank by the settler and given to the Big Lost River Irrigation Company as additional security for the deferred payments (Rec. 473), the settler paying at the time of purchase \$4.00 per acre in cash, the balance in installments extending over a series of years. The settler's contract was made a mortgage or lien upon the interest in the system which the settler purchased (Rec. 564). The Big Lost River Irrigation Company in turn, and as additional security for the bonds which it issued, assigned and transferred to appellants all payments due from the settlers under their respective contracts (See Trust Deed, Deft's Exhibit 67 and Rec. 354), and as security therefor it also assigned to appellants said contracts and the shares of stock in the Lost River Water Company and we respectfully submit that the Court in this case by its decree has made it impossible for the State of Idaho to carry out the plan which it adopted for the construction of these works and for the management of the irrigation system after the works were constructed. It has made it impossible for the settlers to receive what was sold them by the Big Lost River Irrigation Company and what the State required that they should have and receive for the payment which they made and the mortgage which they gave upon their property, and none of these parties are before the Court.

The fact that the settlers' contracts have been deposited and pledged with appellants, and that appellants are parties to the suit, does not justify the form or kind of decree that was entered in this case. A contract cannot be

cancelled or abrogated unless all the parties to it are before the Court.

VI.

*Under the Laws of Idaho Irrigation Companies May Sell
Water Rights Free and Clear of Existing Encum-
brances on the System.*

That the settlers purchased their undivided and proportionate interest in the irrigation system and water rights involved in this case, free and clear of the liens of appellees, can not in the face of the express provisions of the Idaho statutes, and the decisions of the Idaho Supreme Court be seriously denied.

Section 3292 of the Idaho Revised Codes reads as follows:

“When any payment is made under the terms of a contract, by means of which payment a perpetual right to the use of water necessary to irrigate a certain tract of land is secured, said water right shall forever remain a part of said tract of land, and the title to the use of said water can never be affected in any way by any subsequent transfer of the canal or ditch property or by any foreclosure or any bond, mortgage or other lien thereon; but the owner of said tract of land, his heirs or assigns, shall forever be entitled to the use of the water necessary to properly irrigate the same, by complying with such reasonable regulations as may be agreed upon, or as may from time to time be imposed by law. And said payment for said water right shall be a release of any bond or mortgage upon the canal property of the person or company from whom such right is purchased or their successors or assigns, to the amount of such water right thus purchased and paid for, and said person or company from whom such water right is purchased shall furnish to the party or parties pur-

chasing such right, a release, or a good and sufficient bond for a release, from said mortgage or bonded indebtedness to the amount of the water right thus purchased."

This identical statute was before the Idaho Supreme Court in *Hewitt vs. Great Western Beet Sugar Company*, 20 Idaho 235, 118 Pac. 296, and it was there held that purchasers of water rights were not affected by the fact that there was an outstanding mortgage against the irrigation system, but notwithstanding such mortgage they could deal directly with the mortgagor or irrigation company and make payments to such company, and that the rights acquired from such company were not subject to the lien of the mortgage on the system. The Court said:

"This statute became the law of this State on March 7, 1895, and was the law of this State at the time appellant accepted the mortgage involved in this case and became a part of his mortgage. This section is plain, and clearly provides that when payment is made upon a perpetual water right the water right shall remain a part of the tract of land for which the same is purchased, and the title to the use of said water can never be affected in any way by any subsequent transfer of the canal or ditch company, or by any subsequent foreclosure of any bond, mortgage or other lien. This section was enacted for the protection of the purchasers of water rights purchased from an irrigation system or canal company engaged in the diversion and transmission for use of the public waters of the State."

This important question was entirely ignored by the District Court. There can be no valid reason for not determining it in this suit. The interest of the settlers in the system has by them been mortgaged and the mortgages are held by these appellants, and if the settlers' interest is not subject to appellees' liens, appellants, as

mortgagees of such interest, have a right to demand that the decree does not involve them in unnecessary litigation or throw a cloud upon the title to property not subject to a lien. There is neither precedent, law, nor reason for the Court doing the vain thing of pretending to sell property which it has not previously determined it has the right to sell. The decree in this case should have expressly reserved the interest in the system sold to the settlers, and covered by the mortgages pledged with appellants as security for the bonds.

VII.

The Contract Between the State of Idaho and the Big Lost River Irrigation Company Dated May 27, 1909, Is not Assignable Without the Consent of the State, and the Court Erred in Decreeing the Sale of Such Contract.

It is settled law that a contract coupled with liabilities and financial responsibility and involving a relation of personal confidence and trust, is not transferrable or assignable without the consent of the other contracting party.

The Supreme Court of the United States in *Arkansas Valley Smelting Co. vs. Belden Mining Co.* 127 U. S. 379, 32 L. Ed. 246, said:

“At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the par-

ties that it shall not be assignable. But everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.' *Humble vs. Hunter*, 12 Q. B. 310, 317; *Winchester vs. Howard*, 97 Mass. 303, 305; *Boston Ice Co. vs. Potter*, 123 Mass. 28; *King vs. Batterson*, 13 R. I. 117, 120; *Lansden vs. McCarthy*, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' *Pollock, Cont.* 4th ed. 425."

This principle has been repeatedly applied by the Courts. See:

Demarest vs. Dunton Lumber Co. 161 Fed. 264.

Boston Ice Co. vs. Potter, 123 Mass. 28; 25 Am. Rep. 9.

Winchester vs. Howard, 97 Mass. 303; 93 Am. Dec. 93.

The Court in this case held that appellees had a lien upon the contract dated May 27, 1909, between the State of Idaho and George S. Speer, which contract was later assigned to the Big Lost River Irrigation Company with the consent and approval of the State.

We have heretofore referred to the proposition that there is no law under which appellees' liens could be extended to a contract or franchise of that kind, but, independent of that proposition an examination of the law under which the contract was made shows clearly that

such contracts are not transferrable or assignable without the consent of the State.

The contract is not one let to the lowest bidder upon public notice, but it is one resting upon the financial responsibility of the contracting company and upon the trust and confidence which the State reposes in that company to carry out its agreements and deal justly with the public or settlers for whom the works are constructed at the instance and under the supervision of the State.

Section 1615 of the Idaho Revised Codes (see appendix to brief) requires the corporation in its proposal to the State to set forth the names and place of residence of its officers and directors, and of the amount of its authorized and of its paid up capital, and in the case of an individual it requires the proposal to set forth all facts necessary to enable the State Board of Land Commissioners to determine the financial ability of the person seeking the contract to carry out the proposed undertaking.

The contract itself (Record 459) recites that Mr. Speer "has made a satisfactory showing as to the ability of himself and those whom he represents to construct the said irrigation works and to complete the same within the time allowed by law * * * ", and the record shows that Mr. Speer was a financier of standing and the partner in a large Chicago bond house.

The Court has undertaken to sell the contract to the highest bidder and to substitute for the contracting parties selected by the State, the highest bidder at the sale ordered by the Court. This, we respectfully submit, cannot under the law be sustained and it cannot be so easily disposed of as it was by the trial court, viz. that "if the

State is not bound to recognize the purchaser at the foreclosure sale as the successor in interest to all the construction company's rights, then, to be sure, there is need for solicitude on the part of the plaintiff, but not on the part of the mortgagee." Upon that same theory appellant's lien could have been extended to all property within the State of Idaho by whomsoever held, leaving it for future determination whether the purchaser at the sale as a matter of fact secured any property through his purchase. Such decrees do not settle contests or controversies, but can only serve as prolific sources of litigation, and, as stated before, they do not tend to inspire competitive bidding at judicial sales. There is nothing to commend such procedure, but there is every reason for condemning it.

Appellants as pledgees of settlers' contracts aggregating over \$1,800,000.00, all made under and subject to the terms and provisions of the State contract, have a right to know how and in what manner the State contract is affected by appellees' liens, and whether the plan of construction and the plan for operating and turning over the system to the settlers outlined in the State contract will be carried out, whether the settlers must deal with the Court and the purchaser at the judicial sale or with the State, or the party with whom the State sees fit to contract for the completion of said system. The purchaser at the judicial sale is by no means the only person concerned over what becomes of the State contract and who, if any, is authorized to carry it out.

VIII.

The Irrigation System Cannot Be Sold Without the Right of Redemption.

The decree in this case directs that the irrigation system, property and assets of the Big Lost River Irrigation Company upon which appellees are decreed a lien, shall be sold without the right of redemption. It declares (Record p. 674) :

“And that under and by said sale all equity of redemption of the defendants * * * in and to said property, lands, rights and franchises be foreclosed and cut off and forever barred, and that said property be sold as an entirety and in one parcel without valuation, appraisement or redemption * * * by the Special Master of this Court (Record, 677). That upon the payment of the purchase price by the purchaser or purchasers of said property, said Special Master shall execute and deliver a deed, conveying the property purchased to said purchaser * * * and upon the execution and delivery of such deed the grantee thereunder shall be let into the possession of the premises conveyed.”

This is in direct contravention of the Statutes of the State of Idaho. Section 4490 of the Idaho Revised Codes reads as follows:

“Upon a sale of real property, the purchaser is substituted to, and acquires all the right, title, interest and claim of the judgment debtor thereto; * * * When the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale containing:

“1. A particular description of the real property sold.

“2. The price bid for each distinct lot or parcel;

“3. The whole price paid.

“4. When subject to redemption, it must be so stated. And when the judgment, under which the sale

has been made, is payable in a specified kind of money or currency, the certificate must also show the kind of money or currency in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed for record by the officer in the office of the recorder of the county."

Section 4492 provides that:

"The judgment debtor or redemptioner may redeem the property from the purchaser within one year after the sale, on paying the purchaser the amount of his purchase with ten per cent. interest thereon in addition * * *"

Section 4520 of the Idaho Revised Codes provides that:

"Sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in the case of sales under execution."

These identical statutes were before the Supreme Court of Idaho in the case of *Hewitt vs. Walters*, 21 Idaho 1; 119 Pac. 705. In that case the sale was a general receiver's sale, made for the purpose of winding up the corporation and paying its debts and liabilities. It was not a *foreclosure* sale, as we have in this case, and it was there contended that even a receiver's sale could not be made without the right of redemption. The Court said:

"This objection presents a question which must be determined upon the peculiar facts and conditions of this particular case. In the first place, it is conceded that the statute of this State nowhere in express terms grants the right of redemption from a receiver's sale. The statute confers the right of redemption from sales made on execution (Sec. 4491) and foreclosure sales (Sec. 4520) and other sales under foreclosure of various liens. Under Sec. 4491, a creditor having a lien by judgment or mortgage on the property sold, subsequent to the lien on which the sale was made has the right of redemption, the same as the judgment debtor would have. The plaintiff in

this case would have under the statute the right to redeem the property from any sale made for the satisfaction of judgments or liens that were prior to his mortgage. * * *

"For discussions of the right and power of courts to order receiver's sales without the right of redemption, see the following authorities which have been cited by respective counsel:"

The Court then cites many cases showing that receivers' sales cannot be made without the right of redemption, and some holding that they can. The Court then adds:

"It is unnecessary, however, for us to determine that question in this case, and we reserve our judgment thereon, for the reason that the facts of this case remove it from the contingency above suggested."

The Court then shows that Hewitt was estopped from raising the question because of stipulations and because of the decree having become final without an appeal on that question having been taken therefrom. After discussing that question the Court says:

"In other words, the sale here being made is not a sale on foreclosure but is a sale by the Court's receiver under direct authority and supervision of the Court. The plaintiff has consented to and acquiesced in the order and decree and is now bound thereby."

The Idaho statute is identical with the California statute on the subject, and it has been frequently construed by the California Court. See:

Phillips vs. Hagart, 113 Cal. 552.

Eldredge vs. Wright, 55 Cal. 531

Levy vs. Burkle (Cal.), 14 Pac. 564.

In *Brown vs. Bryan*, 6 Idaho 1; 51 Pac. 995, the Court said:

"The Legislature has provided that all contracts in restraint of the equity of redemption are void."

See also:

Brine vs. Hartford Fire Ins. Co. 96 U. S. 627; 24 L. Ed. 858.

Locey Coal Mine vs. Chicago W. & V. Coal Co. 131 Ill. 9, 8 L. R. A. 598, 22 N. E. 503.

Fitch vs. Wetherbee, 110 Ill. 475.

Simmons vs. Taylor, 38 Fed. 693.

Hammock vs. Farmers, Etc. Co. 105 U. S. 74, 26 L. Ed. 1111.

Mason vs. Northwestern, Etc. Co. 106 U. S. 163, 27 L. Ed. 129.

Providence, Etc. Co. vs. Camden, 177 Fed. 861.

In *Parker vs. Daeres*, 130 U. S. 43; 32 L. Ed. 848, the Supreme Court of the United States, in discussing this question, said:

"This right when thus given is a substantial one to be recognized even in the courts of the United States sitting in equity, because the statute constitutes a rule of property in the State that enacted it."

The statute before the Court in that case was identical with the Idaho statute now before the Court.

In conclusion, appellants submit that appellees are not entitled to a lien upon any of the property covered by appellants' mortgage; that the decree is uncertain in that it does not specifically determine what property is subject to the lien, and what rights or property may be sold at the sale which the decree directs shall be made; and that the Court was without jurisdiction to enter any decree in this case because of the absence of necessary and indis-

pensable parties; that the right of redemption should not have been barred, and that plaintiff's lien should have been held void or unenforceable for failure to comply with the foreign corporation laws of the State.

Respectfully submitted,

MAYER, MEYER, AUSTRIAN & PLATT,

Chicago, Illinois,

AMOS C. MILLER,

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APPENDIX.

*Provisions of Idaho Revised Codes Relating to Construction of Works Under the Carey Act.**Proposals to Construct Irrigation Works.*

Sec. 1615. Any person, company of persons, association or incorporated company, constructing, having constructed or desiring to construct, ditches, canals or other irrigation works to reclaim land under the provisions of this chapter, shall file with the board a request for the selection, on behalf of the State, by the board, of the land to be reclaimed, designating said land by legal subdivisions. This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the land asked to be selected. The proposal shall be prepared in accordance with the rules of the board and with the regulations of the Department of the Interior; and shall be accompanied by the certificate of the State Engineer that application for permit to appropriate water has been filed in his office, together with the State Engineer's report thereon. It shall state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto. In the case of incorporated companies it shall state the name of the company, the purpose of its incorporation, the names and places of residence of its directors and officers, the amount of its authorized and of its paid

up capital. If the applicant is not an incorporated company, the proposal shall set forth the name or names of the party or parties, and such other facts as will enable the board to determine his or their financial ability to carry out the proposed undertaking.

Application for Appropriation Permit to Be Filed.

Sec. 1617. The person, company of persons, association or incorporated company making application to the board for the selection of lands by the State, shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of the lands described in the request of the board. This application for a permit shall be of a form prescribed by the State Engineer, and shall be accompanied by two copies of a map of the land to be selected, and it shall show accurately the location and dimensions of the proposed irrigation works. The maps of the lands and proposed irrigation works shall be prepared in accordance with the regulations of the State Engineer's office and the rules of the Department of the Interior.

Submission of Proposal to State Engineer.

Sec. 1618. Immediately upon the receipt of any request and proposal, as designated in Section 1615, it shall be the duty of the Register to examine the same and ascertain if it complies with the rules of the board and the regulations of the Department of the Interior. If it does not, it is to be returned for correction; but, if it does so comply, it shall be submitted to the State Engineer, who shall examine the same and make a written report to the board, stating whether or not the proposed works are feasible; whether the proposed diversion of the public

waters of the State will prove beneficial to the public interest; whether there is sufficient unappropriated water in the source of supply; and whether or not a permit to divert and appropriate water through the proposed works has been approved by him; whether the capacity of the proposed works is adequate to reclaim the land described; whether or not the proposed cost of construction is reasonable; and whether or not the maps filed in his office comply with the requirements of said office and the regulations of the Department of the Interior; also whether or not the lands proposed to be irrigated are desert in character and such as may properly be set apart under the provisions of the aforesaid act of Congress and the rules and regulations of the Department of the Interior thereunder. Whenever the State Engineer shall be unable, from an examination of the maps and field notes submitted for his examination, to determine whether or not the proposed irrigation works are feasible and adequate, whether or not the proposed cost of construction is reasonable, or whether or not the proposed diversion of the public water would be beneficial to the public interest, and whether or not the lands proposed to be irrigated are of such a character as to come under the provisions of the aforesaid act of Congress, it shall be his duty to make, or cause to be made by some qualified assistant, such survey or examination as will enable him to report intelligently thereon to the board.

Contract With Proposed Contractor.

Sec. 1621. Upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the board to enter into a contract with the parties submitting the

proposal, which contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works; the price and terms per acre at which such works and perpetual water rights shall be sold to settlers; and the price and terms upon which the State is to dispose of the lands to settlers. This contract shall not be entered into on the part of the State until the withdrawal of the lands by the Department of the Interior and the filing of a satisfactory bond on the part of the proposed contractor for irrigation works, which bond shall be in a penal sum equal to five per cent. of the estimated cost of the works, and shall be conditioned for the faithful performance of the provisions of the contract with the State.

Same; Limitations on Terms.

Sec. 1622. No contract shall be made by the board which requires a greater time than five years for the construction of the works, and all contracts shall state that the work shall begin within six months from date of contract; that at least one-tenth of the construction work shall be completed within two years from the date of said contract; that construction shall be prosecuted diligently and continuously to completion, and that a cessation of work under the contract with the State for a period of six months after the second year, without the sanction of the board, will forfeit to the State all rights under said contract.

Forfeiture of Contract for Contractor's Default.

Sec. 1623. Upon the failure of any parties, having contracts with the State for the construction of irrigation works, to begin the same within the time specified by the

contract, or to complete the same within the time or in accordance with the specifications of the contract with the State, to the satisfaction of the State Engineer, it shall be the duty of the Register to give such parties written notice of such failure; and, if after a period of sixty days from the sending of such notice, they shall have failed to proceed with the work or to conform to the specifications of their contract with the State, the bond and contract of such parties and all works constructed thereunder shall be at once and thereby forfeited to the State; and it shall be the duty of the board at once so to declare and to give notice once each week, for a period of four weeks, in some newspaper of general circulation in the county in which the work is situated, and in one newspaper at the State capital in like manner and for a like period, of the forfeiture of said contract, and that upon a fixed day proposals will be received at the office of the board in the Capitol at Boise City for the purchase of the incompleted works and for the completion of said contract, the time for receiving said bids to be at least sixty days subsequent to the issuing of the last notice of forfeiture. The money received by the board from the sale of partially completed works under the provisions of this section shall first be applied to the expenses incurred by the State in their forfeiture and disposal, and to satisfying the bond; and the surplus, if any exists, shall be paid to the original contractors with the State.

Application to Enter Land.

Sec. 1626. Any citizen of the United States, or any person having declared his intention to become a citizen of the United States (excepting married women) over the

age of twenty-one years, may make application, under oath, to the board, to enter any of said land in an amount not to exceed one hundred and sixty acres for any one person; and such application shall set forth that the person desiring to make such entry does so for the purpose of actual reclamation, cultivation and settlement in accordance with the Act of Congress and the laws of the State relating thereto, and that the applicant has never received the benefit of the provisions of this chapter to an amount greater than one hundred and sixty acres, including the number of acres specified in the application under consideration. Such application must be accompanied by a certified copy of a contract for a perpetual water right, made and entered into by the party making an application with the person, company or association, who has been authorized by the board to furnish water for the reclamation of said lands; and, if said applicant has at any previous time entered lands under the provisions of this chapter he shall so state in his application, together with description, date of entry and location of said land. The board shall thereupon file in its office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant. All applications for entry shall be accompanied by a payment of twenty-five cents per acre, which shall be paid as a partial payment on the land if the application is allowed; and all certificates when issued shall be recorded in a book to be kept for that purpose. If the application is not allowed, the twenty-five cents per acre accompanying it shall be refunded to the applicant. The board shall dispose of all lands accepted by the State under the provisions of this

chapter at a uniform price of fifty cents per acre, half to be paid at the time of entry and the remainder at the time of making final proof by the settler.

Water Contracts a Lien on Lands Foreclosures.

Sec. 1629. Upon the issuance of a patent to any lands by the United States to the State, notice shall be forwarded to the settler upon the land. It shall be the duty of the board, under the signature of the president attested by its Register, to issue a patent to said lands from the State to the settler.

The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the State. Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired. The contract for the water right upon which the aforesaid lien is founded shall be recorded in the office of the recorder of the county where said land is situate. * * *

Rights of Way for Canals.

Sec. 1630. The maps in the office of the board of the lands selected under the provisions of this chapter, shall show the location of the canals or other irrigation works approved in the contract with the board, and all lands filed

upon shall be subject to the rights of way of such canals or irrigation works. Each right of way shall embrace the entire width of the canal and such additional width as may be required for its proper operation and maintenance, the width of right of way to be specified in the contracts provided for in this chapter.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CONTINENTAL AND COMMERCIAL TRUST &
SAVINGS BANK, a Corporation, and FRANK
H. JONES, Trustees, Appellants,

vs.

COREY BROS. CONSTRUCTION COMPANY, a
Corporation, and UNION PORTLAND CEMENT
COMPANY, a Corporation, Appellees.

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division*

BRIEF FOR APPELLEES, COREY BROS. CON-
STRUCTION COMPANY, A CORPORATION,
AND UNION PORTLAND CEMENT COM-
PANY, A CORPORATION.

FILED

MAY 14 1913

H. H. HENDERSON,
Attorney for Appellees.



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**BRIEF FOR APPELLEES, COREY BROS. CON-
STRUCTION COMPANY, A CORPORATION,
AND UNION PORTLAND CEMENT COM-
PANY, A CORPORATION.**

STATEMENT OF THE CASE.

On May 27, 1909, one George S. Speer entered into a contract with the State Land Board of Idaho to build a dam and construct an irrigation system on the Big Lost River in the State of Idaho, pursuant to the provisions of Section 4 of an act of congress approved August 18, 1894 (28 Stat. 422), as amended by

act of June 11, 1896 (29 Stat. 413, 434), and Section 3 of the act of March 3, 1901 (31 Stat. 1188), and of Section 1613 to 1634, inclusive, of the Idaho Revised Codes. This undertaking is popularly known as a "Carey Act project," and provided for the irrigation of about 100,000 acres of arid land in the Counties of Blaine, Bingham, Custer and Fremont, of Idaho.

On June 15, 1909, the defendant, Big Lost River Irrigation Company, was organized under the laws of the state of Idaho with \$1,000,000 capitalization to take over this contract of Speer's and construct the irrigation system. On or about the 21st day of July, 1909, with the consent of the State Land Board of Idaho, this company acquired all the rights of George S. Speer and agreed to build this system of irrigation. The promoters and organizers of this corporation were C. B. Hurtt, James E. Clinton, Jr., N. M. Ruick, George S. Speer and others. When the corporation was first organized the incorporators subscribed for one share of stock each, being \$700.00 out of the one million capitalization. Speer was not one of the original incorporators, but was the actual promoter of the corporation, and became the owner within a few weeks after the organization of \$999,300 of the capital stock. Speer at this time was also vice president of the corporation known as Trowbridge & Niver, a bond house of Chicago, and which became the fiscal agent of the Big Lost River Irrigation Company.

Afterwards, on August 26th, 1909, the Big Lost River Irrigation Company entered into a written contract with the Corey Bros. Construction Company, a Utah corporation, to do all the work of building the dam and canals at certain mutual agreed prices. All the work was to be done under the immediate supervision of the engineers of the Big Lost River Irrigation Company.

The Arnold Company, a corporation of Chicago, had the contract with the Big Lost River Irrigation Company for drawing all plans and supervising all the engineering work of this project.

Prior to August 26, 1909, to-wit, on or about June 15, 1909, Corey Bros. Construction Company, pursuant to a talk and verbal understanding with the organizers and promoters of the Big Lost River Irrigation Company, commenced to construct this irrigation system. Prior to Corey Bros. Construction Company commencing work, the promoters of the Big Lost River Irrigation Company furnished to Corey Bros. a form of contract which was afterwards signed by the Big Lost River Irrigation Company (without any changes, except inserting the date) on August 26, 1909.

This contract provided that 90% of the cost of the materials furnished and work done should be paid to Corey Bros. Construction Company by the Big Lost River Irrigation Company on or before the 10th

day of each calendar month for all work done during the preceding calendar month, and that said payments should be made on the estimates of the engineer of the Big Lost River Irrigation Company of the amount of work done and material furnished.

In compliance with this contract furnished to Corey Bros. Construction Company by the promoters of the Big Lost River Irrigation Company, monthly estimates were furnished to Corey Bros. Construction Company by the Arnold Company, commencing on the 1st day of July, 1909.

It may be well to state here that all the payments of money made to Corey Bros. Construction Company, except one payment that was made by the Big Lost River Irrigation Company, were made by Trowbridge & Niver, and were credited by Corey Bros. Construction Company to the account of the Big Lost River Irrigation Company.

On August 15, 1910, the Big Lost River Irrigation Company, having failed to comply with its agreement to make the payments for work done, Corey Bros. Construction Company stopped work upon this system, and refused to do any more work until the Big Lost River Irrigation Company should comply with its contract making the payments as agreed upon. At this time the Big Lost River Irrigation Company was insolvent, and Corey Bros. Construction Company being unable to get any further pay-

ments from the Big Lost River Irrigation Company, within the time provided by statute, filed a mechanic's lien upon all the land, canals and dam and water rights belonging or connected with the system of the Big Lost River Irrigation Company in the Counties of Blaine, Bingham, Custer and Fremont.

At this time there was due to Corey Bros. Construction Company about the sum of \$525,000.

On the 27th day of August, 1909, the Big Lost River Irrigation Company executed and acknowledged a deed of trust to the American Trust and Savings Bank (now the Continental and Commercial Trust and Savings Bank) and Frank H. Jones, as Trustees, to secure two million worth of bonds, which bonds were dated July 1, 1909, upon the irrigation system being constructed by Corey Bros. Construction Company for the Big Lost River Irrigation Company, which deed was, on the 3rd day of September, 1909, filed for record in the counties of Bingham and Blaine and later was filed for record in the counties of Fremont and Custer. On January 1, 1910, the Big Lost River Irrigation Company made and executed another trust deed to the said Trustees to secure \$400,000 worth of bonds, which trust deed was thereafter filed for record in the above named counties.

On October 15, 1910, Corey Bros. Construction

Company filed a bill in equity in the United States Circuit court for the District of Idaho to foreclose its mechanics lien, and made as parties defendant the Big Lost River Irrigation Company, The American Trust and Savings Bank (now The Continental and Commercial Trust and Savings Bank) a corporation, and Frank H. Jones as Trustees.

Corey Bros. Construction Company being a corporation organized and existing under and by virtue of the laws of the state of Utah, and a resident and citizen of said state.

The Big Lost River Irrigation Company being a corporation organized and existing under and by virtue of the laws of the state of Idaho, and a resident and citizen of the state of Idaho.

The American Trust and Savings Bank (now The Continental Trust and Savings Bank) being a corporation organized and existing under and by virtue of the laws of the state of Illinois, and a resident and citizen of Illinois.

Frank H. Jones being also a resident and citizen of the state of Illinois.

Afterwards, and before these defendants had plead, Corey Bros. Construction Company filed an amended bill in said action making these same parties defendants, and also made the Union Portland Cement Company, a corporation, organized and existing under and by virtue of the laws of the state of

Utah, and a resident and citizen of the state of Utah, J. M. Bate and Joseph Bate, copartners under the firm name and style of Bate & Bate; Nephi Straw, A. W. Cherrington and Jas. Miller, co-partners under the firm name and style of Straw, Cherrington & Miller; F. C. Gammell and James Straw, Jr., co-partners under the firm name and style of Gammell & Straw, and A. C. Bird, residents and citizens of the State of Utah; Goyne Drummond, a resident and citizen of the state of Wyoming; Nephi Hansen and Ephraim Hansen, co-partners under the firm name and style of Hansen Bros., K. L. Molen and R. E. Kutler, co-partners under the firm name and style of Molen & Kutler; J. W. Curd and N. Foss, co-partners under the firm name and style of Curd & Foss; K. L. Molen and Jesse Molen, co-partners under the firm name and style of Molen & Molen; David Chamberlain and Thomas Chamberlain, co-partners under the firm name and style of Chamberlain Bros.; Frank Hess, S. H. Walton, F. L. Pinney and William Mooney, residents and citizens of the State of Idaho, parties defendants.

Thereafter, on the 21st day of January, 1911, before any plea or answer had been made by any of the defendants, on motion of counsel for Corey Bros. Construction Company, an order was entered dismissing said amended bill as to all of the defendants who were residents of the State of Utah, and also as to

Goyne Drummond, who was a resident of the State of Wyoming.

On the 29th day of May, 1911, on application of the attorney for Corey Bros. Construction Company, the United States District Judge appointed a receiver of all the property and effects of the Big Lost River Irrigation Company. Said receiver was appointed on consent of the attorney of the Big Lost River Irrigation Company and The Continental and Commercial Trust and Savings Bank, successor of the American Trust and Savings Bank, Trustee, and Frank H. Jones, trustee, and said receiver is now in possession of all the property of the Big Lost River Irrigation Company.

On the 18th day of September, 1909, the Big Lost River Irrigation Company signed a written contract with the intervenor, Union Portland Cement Company, according to the terms of which the Union Portland Cement Company agreed to furnish all the cement for the Big Lost River Irrigation Company at the rate of \$2.84 per barrel delivered at Mackay and Moore in the state of Idaho. This written contract was signed pursuant to a verbal contract made with the agent of the Big Lost River Irrigation Company some time before the 18th day of September, 1909. The first cement under this contract was delivered to the Big Lost River Irrigation Company

on the 2nd day of September, 1909, and the last cement on the 25th day of June, 1910.

That on the 20th day of August, 1910, within the time provided by statute, the Union Portland Cement Company filed its mechanic's lien in the Counties of Blaine, Bingham, Fremont and Custer, State of Idaho, and thereafter, on October 22, 1910, the Union Portland Cement Company filed its bill in equity in the United States Circuit Court in and for the District of Idaho, sitting at Boise, to foreclose its mechanic's lien, making as parties defendants the Big Lost River Irrigation Company, The American Trust and Savings Bank (now The Continental and Commercial Trust and Savings Bank) and Frank H. Jones.

Afterwards, on the 4th day of January, 1912, the Union Portland Cement Company filed its complaint in intervention in the case wherein Corey Bros. Construction Company had commenced its suit to foreclose its mechanics lien against the Big Lost River Irrigation Company et al as defendants, this being the suit in which a receiver had heretofore been appointed of all property of the Big Lost River Irrigation Company.

Answers were filed by the defendants in the Corey case where the receiver was appointed and the issues were made up, and the testimony was taken before a Master, and on the 27th day of December,

1912, the judge of the District Court of Idaho signed a final decree in behalf of Corey Bros. Construction Company for the sum of \$609,444.03, and also \$16,000 attorney's fees, and in behalf of the Union Portland Cement Company, intervenor, in the sum of \$16,054.40, and also \$1,000.00 attorney's fees, and \$500.00 costs against the defendant, Big Lost River Irrigation Company, and decreed said sums of money to be a first lien upon all the irrigation system, consisting of canals, dams, reservoirs and water rights belonging to the Big Lost River Irrigation Company, and ordered said property to be sold without equity of redemption to satisfy said sums of money, and said court also decreed that the trust deeds of the defendants, Continental and Commercial Trust and Savings Bank (formerly The American Trust and Savings Bank) and Frank H. Jones, and that the liens of the other defendants were subsequent and inferior to the plaintiff, Corey Bros. Construction Company and the Intervenor, Union Portland Cement Company mechanic's lien.

ARGUMENT

Did Corey Bros. Construction Company Perform its part of the contract made and entered into between it and the Big Lost River Irrigation Company for the building of the Big Lost River Irrigation Project?

It is the contention of the appellants' trustees that Corey Bros. Construction Company so far departed from the terms and specifications of the contract entered into between it and the Big Lost River Irrigation Company that all the work done by Corey Bros. Construction Company is practically worthless, and that the Big Lost River Irrigation Company, by the failure of the said Corey Bros. Construction Company to properly do its work, has been damaged far in excess of any amount claimed by Corey Bros. Construction Company, and therefore Corey Bros. Construction Company is not entitled to any lien upon said project in any amount. This issue was raised entirely by appellants in the amendments made to their answer which were filed in the lower court on the first day, April 5th, 1912, that testimony was taken before the examiner in the court below, (Rec. 65 to 69. Also record 154). This issue was not raised by the defendant, Big Lost River Irrigation Company, unless it can be said

that the denial in paragraph 9 of its answer, found on page 46 of the record, makes such an issue.

It appears in the record that N. M. Ruick was the attorney for both the Big Lost River Irrigation Company and for appellants' trustees, and from the similarity of the denials in both answers, it must be presumed that he was fully acquainted with all the facts in the case.

It is the contention of Corey Bros. Construction Company that it performed all the work upon this project under the immediate and direct supervision of the engineers of the Big Lost River Irrigation Company, which engineers were the agents and the superintendents of the Big Lost River Irrigation Company.

Before entering upon a detailed discussion of the evidence of the various witnesses, it may be well to call the court's attention to some of the terms of the contract made between Corey Bros. Construction Company and the Big Lost River Irrigation Company, and also to some of the terms of the contract made and entered into between the Big Lost River Irrigation Company and the Arnold Company of Chicago, which had the contract for doing all the engineering work.

In the contract made between Corey Bros. Construction Company and the Big Lost River Irriga-

tion Company under the head of "Definition of Terms," we find the following:

"The term Engineer is used to designate the Consulting Engineer duly appointed and assigned by the Company to have general charge of all work incidental to the construction of the Company's project ready for operation." (Rec. 484).

Under the head of "Inspection," paragraph 5, we find the following:

"The Supervising Engineer, or his duly authorized assistants shall at all times have access to the work, **which work is to be entirely under their control.**

"Any material or construction which does not fully accord with the letter or the intent of these specifications may be condemned by the Engineer or his representatives, and the Contractor shall immediately rectify or replace such defective work without expense to the company." (Rec. 486, 489).

Under the head of "Specification for the construction of earth dam and controlling works," under paragraph 3 (Rec. 497) we find the following:

"All material that has been rejected by the Engineer on the work is to be removed at once from the site of the work. Any work that has been done, and has been found to be defective, shall at the direction of the Engineer be taken out and replaced to the satisfaction of the Engineer."

Under paragraph 5 of this contract (Rec. 502), we find the following:

“Monthly estimates shall be made by the Engineer of the work completed and material on hand but not yet in place, and the company will, on or before the tenth day of each calendar month, make payment to the contractor of 90 per cent of these estimates, based on the unit contract prices for all work completed, and the actual cost of material on hand, but not in place.”

Throughout the whole of this contract the word “engineer” appears a great many times, and it is certain beyond peradventure of doubt that according to the terms and specifications of this contract that Corey Bros. Construction Company was to be guided entirely by the engineers of the Big Lost River Irrigation Company in the doing of this work.

Reverting now to the contract made between the Big Lost River Irrigation Company and The Arnold Company, we find the following provisions under article 1:

“(1). This contract is intended to include all the engineering work of whatsoever nature necessary to complete the irrigation system of the Big Lost River Irrigation Company, located in Blaine County, Idaho, ready for operation as a completed irrigation system.” (Rec. 538).

Under Article 2, subdivision 1, we find:

“The Engineer agrees to make all surveys, plans, estimates, and specifications which are necessary preliminary to the letting of contracts for the construction of the structures and canals for the entire project.”

“(3). To furnish the Client with a report covering the possible methods of developing the project with recommendations as to the best sequence for carrying on the construction of the various parts of the work.”

“(4). To supervise the construction of the irrigation project herein specified, **and to interpret the plans and specifications, and for this purpose shall furnish a competent supervising engineer, who shall represent the Engineer** on the construction work, and such a field force is as necessary to stake out the work and measure the same for payment.”

“(5). To supervise and inspect all materials entering into the work, and shall if requested in writing, furnish and submit to the Client all necessary records in connection with such inspection.” (Rec. 539).

Under Article 3, subdivision 2 of said contract we find the following:

“The Client further agrees to pay the Engineer for **supervision of construction**, as heretofore described, an additional two per cent (2%) based on the final contract figures.” (Rec. 540).

Under Article 4, we find also the following:

“The force account work contemplated under this contract consists of the supervising of soundings or borings for foundations, the employment of necessary inspectors to actually supervise the placing of material in the structures, or engineering field work of any nature whatsoever that the Client may require done under the direction of the Engineer, or which the Engineer shall consider necessary to properly prosecute the work.” (Rec. 541).

Taking these two contracts together it will seem that Corey Bros. Construction Company were to be guided entirely in the performance of their work by the engineers of the Big Lost River Irrigation Company. The Arnold Company, which was the Engineer, being a corporation could only act through its officers and duly authorized agents.

W. H. Rosecrans was styled chief engineer, and had his office in Chicago.

The engineers in charge in this field and who would properly be styled supervising engineers under the foregoing contract of this work first were Raschbacher and then Drummond. W. W. Corey testified, which testimony is uncontradicted, that Hurtt, the President of the Big Lost River Irrigation Company told him that his company would receive orders from Raschbacher and afterwards from Drummond. (Rec. 163). W. W. Corey further testi-

fied that his company did the work according to the plans and specifications in the contract and under the directions of the engineers in charge of the work. (Rec. 194).

Orson O. Corey testified to the same fact. (Rec. 218).

This testimony was also corroborated by Goyne Drummond, the engineer in charge of said work for and on behalf of the Big Lost River Irrigation Company. In substance Mr. Drummond testified as follows:

“Raschbacher gave Corey Brothers directions while I was there. He was the engineer in charge prior to the time I took charge. I gave Corey Bros. instructions as to where I wanted the work done, canals, laterals and dams. I was acquainted with the contract between Corey Brothers and Big Lost River Irrigation Company. I gave them all the instructions that were necessary to do the work, how I wanted certain materials placed in the canals, and what work on the canals and laterals I wanted first completed. Corey Bros. Construction Company followed the terms of this contract with the Big Lost River Irrigation Company in doing that work.” (Rec. 156).

Frank A. Coy, an engineer in charge of the dam, a witness in behalf of appellants' trustees, also testified that Corey Bros. Construction Company did its

work in accordance with the contract. (Rec. 392).

At this time it may be well to discuss the testimony offered by the appellants' trustees in support of the affirmative matter set out in their answer, keeping in mind that the Big Lost River Irrigation Company though it was represented at the trial by counsel, did not introduce any evidence whatever.

One Mr. Samuel Storrow was an expert witness on behalf of appellants' trustees. In discussing Mr. Storrow's testimony it would be well to keep in mind that the dam was about one half completed.

In the latter part of June and the first part of July, 1911, Mr. Storrow, in accordance with instructions from Harrison B. Riley, Chairman, and other members of the Bondholders' Committee, proceeded to make an examination of the Mackey dam and irrigation system of the Big Lost River project.

Mr. Storrow in his direct examination and in speaking of the dam said that he found a very heavy leakage through the dam, and some leakage through the core wall. That the bottoms of all the dumps throughout the dam everywhere were composed of coarse material which had rolled down the slope from the dumping cars; in all places where the core-wall was exposed the material next to it was coarse, full of boulders, either not puddled or puddled so slightly as to leave crevices, those near the core-wall not more than half closed and sometimes not closed

at all. That he found that the cutting away in the borrow pits had been carried so close to the body of the dam **as to present an opportunity for the face of the dam to slide down into the borrow pit.** That the material excavated from both tunnel and parts of the spillway had been thrown down onto the dam as it was being built. That he made an examination of some parts of the core-wall in plain sight and found no evidence of bonding, except that when they got through building, one piece of concrete by and by they came back and built another. That the effect of this method of construction would cause the core-wall to leak. That the toe of the dam according to his recollection was not distant more than ten feet from the borrow pits. That he examined the gravel pits and found the gravel rather coarse, but containing a considerable amount of finer gravel until the finest became almost impalpable powder. (Rec. 251). That the object, purpose and effect of puddling is to get fine material from one part of the work and add that fine material to the fill of another part, for the purpose of rendering more water tight and impervious that place to which the fines are added by the process of puddling. **That he found 1,500 or 1,800 cubic yards of material dumped from a trestle crossing the core-wall,** and that he found other evidence that material

had been dumped from trestles at different angles to the core-wall.

That if material is dumped from a trestle crossing the core-wall at an angle of 90 or 45 degrees an impervious bank against the core-wall could not be obtained by any amount of puddling. By puddling fine material is moved horizontally. That a dam so constructed, completed to a height of 120 feet would not in my opinion sustain a height of water of 100 feet. That the borrow-pits were in the cone at Cedar Creek. **With a core-wall extending only 6 or 8 feet below the original surface in the cone, and the back filled trench to the same depth, there would, in my opinion, be a very serious leakage under the fill that would unquestionably affect the amount of water in the reservoir and cause the wreck of the dam.**

Where the dam is designed with a core-wall in the middle, with puddled material beside it, the office of a core-wall and puddled portion is to connect the body of the dam with the substantially impervious material below, thereby forming the impervious portion of the fill; the balance of the fill is for weight and strength to resist the thrust. (Rec. 254 and 255.)

To remove the central portion of the dam and replace the material by a puddling process in accordance with the specifications **is not practicable;**

the expense would be too great. That he made estimates as to what it would cost to take this dam on **this** site and make a satisfactory dam of it, varying from the specifications so as to hold a 100-foot head of water, and it would cost \$600,000. (Rec. 256).

The foregoing are some of the principal objections that Mr. Storrow had to find with the Mackay dam in its construction. Let us examine these objections in the light of other evidence that was offered on this subject and see whether the contractor did not perform his duty as outlined by the contract.

Mr. Storrow defines puddling as removing by water the finer materials from a bank of dirt or gravel and depositing this finer material in another place removed from said bank of dirt or gravel. Theoretically in some instances this definition may be correct, but what does the contract say? Under subdivision eight of the specifications for the construction of the dam we find the following:

“The method of puddling this material shall be as follows: It is the intention to thoroughly wet the interior portion of the dam throughout a section of embankment, which extend for a distance of 30 feet each side of the core-wall at the base of the dam at the maximum height, with a width of 6 feet of wetted section on the crest of the dam, the limits being defined for various eleva-

tions of dams by straight lines drawn between these points. Such labor must be performed and plant furnished to carry out this wetting continuously during the forming of embankment as is **satisfactory to the Engineer**. The cost of this wetting, plus 10 per cent, will be paid as hereinafter specified.

“In general, it is expected that **all** of the material developed in the borrow pits is suitable material but the Contractor will be required to leave any large amount of undesirable material in the pits, and will be required within practical limits to so conduct the lacing of the material in the embankment as to mix the various materials which may be encountered. No frosty material will be allowed placed in the embankment, and the Contractor will be required to so saturate the wetted portion of the dam as to entirely dissolve any lumpy material.”
(Rec. 514).

Previous to the drawing of this contract it would appear that the material in the borrow pits had been examined by the engineers, and that material was considered suitable material to be dumped upon this portion of the dam that was to be thoroughly wetted, and after this material was dumped according to the express terms of this contract, it was to be wetted to the satisfaction of the engineer in charge of the work. Counsel for appellants' trustees try to evade this express provision of the contract by referring

to other portions of the contract, stating that the material deposited next to the core-wall should be impervious material, and impervious material could not be placed there without sluicing it in the manner described by Mr. Storrow. This was a question to be decided by the engineer of the Big Lost River Irrigation Company, and if we followed his instructions, we performed our duty. The evidence is uncontradicted in this regard that we did follow his instructions.

Mr. Green, one of the engineers called by the appellants' trustees, stated that this fine material should have been sluiced in there or else the fine material should have been screened and carried there by cars and deposited and thoroughly wetted. (Rec. 405).

Mr. Raschbacher, the resident engineer of the Big Lost River Irrigation Company, approved of the method of Corey Bros. Construction Company for wetting it, and afterwards in the month of September, 1909, ordered another pump placed upon the work, which was done. Plaintiffs' Ex. 84. (Rec. 428).

The evidence further shows that Mr. Rosecrans, the chief engineer of the Big Lost River Irrigation project, was there at least once or twice during the summer and fall of 1909, and he must have seen the manner of dumping this gravel, and by his silence,

found no fault with it, and the fact that Mr. Rosecrans as chief engineer approved of the monthly estimates for this work done by Corey Bros. Construction Company shows that he affirmatively approved of the manner and method of the fill and the manner of wetting the gravel.

Storrow finds fault with the execution of the plans and specifications, for the reason that a tunnel was built for the spillway instead of an open cut, and a part of the rock from this spillway tunnel was dumped into the dam below and near the core-wall. This tunnel was built under the immediate direction of the engineer in charge.

On June 7, 1909, Mr. Raschbacher, the engineer in charge, wrote the following letter to Corey Bros. Construction Company.

Mackay, Idaho, 6, 7, 09.

Corey Brothers Construction Company,
Mackay, Idaho.

Gentlemen: Conditions being such that same can be carried out by contractors without additional expense or any delay in work, authority being given engineer to determine same, you are hereby notified that all spoil from tunnel approaches, tunnel bore and spillway excavation, **must be deposited within slope stakes of Mackay reservoir dam.**

Sincerely yours,

H. B. Raschbacher,

“Engr. The Arnold Company.”

Rec. 186).

Counsel for defendants trustees severely castigate the contractor for permitting part of this spoil to be deposited within twenty feet of the core-wall.

The evidence is uncontradicted that Mr. Rosecrans, the chief engineer, was there several times during the summer and fall of 1909, and saw this tunnel and saw where this spoil was being deposited, and by his silence approved of it, and Mr. Rosecrans affirmatively approved of the building of this tunnel by signing the monthly estimates that were delivered to Corey Bros Construction Company. Exs. 38 to 41. (Rec. 200).

The monthly estimates delivered to the contractor, signed by Rosecrans, particularly designated the rock work taken out of this spillway tunnel. All of these estimate sheets gave in detail all the work done, so that Mr. Rosecrans could keep himself informed of the kind, nature and the progress of the work. Plaintiffs' Ex. 19. (Rec 428).

Again fault is found by Storrow that in the places that he made his examination that the core-wall was not built upon solid rock or impervious material. If this were so, I think this is the most serious objection that could be made.

Let us examine the record. Frank A. Coy, a witness called by appellants' Trustees, and one of the engineers of the Big Lost River Irrigation Company, laid out the trench for this core-wall and set

the stakes for its depth. The blue prints show that the core-wall should be set into the ground six feet. Defendants' Trustees Ex. No. 1. The printed contract indicates that the core-wall should be put down to impervious material. This being so, who was to determine what was impervious material, if not the engineer? Coy did not quit the work until the latter part of November, 1909, long after the tunnel had been constructed, and long after the spoil from the tunnel had been dumped in the body of the dam, and long after the foundation of the core-wall had been laid.

Coy, in his testimony, under oath, states that during all the time that he was there Corey Bros. Construction Company lived up to the terms and conditions and specifications of the contract. (Rec. 392).

The plans and specifications for the facing of the dam up stream called for riprap. According to the undisputed testimony, the chief engineer, Rosecrans, ordered the face of the dam to be of concrete. Will the gentlemen for the trustees say that this change was not for a betterment of the enterprise? (Rec. 376 and 377).

Storrow says that the borrow pits were excavated too near the toe of the dam; that the plans called for the borrow pits to be located two hundred feet away from the toe of the dam, and that according

to his best judgment one of the borrow pits was within ten feet of the toe of the dam, and that on account of this borrow pit being so near the toe of the dam that there was danger of the face of the dam slipping off into the borrow pits.

Corey and Henderson testified by actual measurements made from the toe of the dam on June 11, 1912, that the nearest pit was one hundred and seventy five feet distant, and the others were one hundred and ninety feet away. (Rec. 426, 436). They further testified that the borrow pits were not excavated in any place lower than the toe of the dam. If the borrow pits were not excavated at any place lower than the toe of the dam how could this concrete face slip off into the borrow pits?

According to Storow's own testimony the nearest borrow pit was ten feet away from the toe of the dam. The cement facing was built upon a ground foundation with a slope of two and one-half to one, which is an angle of less than twenty-two degrees. Storow by his testimony would convey to this court that there was danger to be apprehended by the slipping of this concrete slope into the borrow pits, which is preposterous and unworthy of belief.

Coy staked out these borrow pits and under the terms of the contract that Corey Bros. Construction Company had with the Big Lost River Irrigation Company, the material that was dumped in the dam

was to be measured in the borrow pits. Coy says in his sworn testimony that Corey Bros. Construction Company performed its contract according to the plans and specifications while he was there.

In looking at some of the photographs that have been introduced in evidence, it will be observed that borrow pit number one lays adjacent to the river, and in order to get out of this borrow pit it was necessary for Corey Bros. Construction Company to cut down an embankment eight or ten feet high and to level a space sufficient to lay down two tracks and to provide for the location of a water tank. Storrow, in his desire to do an injustice to the contractor, considers this grade for the track as part of the borrow pit. Corey says that the nearest point of this borrow pit is one hundred and ninety feet from the toe of the dam.

Again Storrow says in his direct examination that the cost of removing material for thirty feet on each side of the core-wall was prohibitive and was impracticable. Let us see whether this statement is justified by the evidence.

According to the plans and specifications this dam was to be about 2,000 feet long and 600 feet wide; a concrete core-wall being in the center. When Corey Bros. Construction Company stopped work upon this system because of the fault and negligence of the Big Lost River Irrigation Company in failing

to make its payments as agreed upon, it had done in round numbers, \$1,215,000 worth of work. \$932,000 had been done upon the canal system. \$241,000 upon the dam. For earth and embankment in the dam, Corey Bros. Construction Company had been allowed for 479,908 cubic yards at 25c a yard, making a total of \$119,977. This yardage spread over an area of ground 2,000 feet long by 600 feet wide, and to remove sixty feet in the center, which could be done with steam shovels, Storrow claims to be prohibitive and impracticable. When Storrow made that statement he knew it to be untrue and he knew it to be false. Taking this statement that the cost would be prohibitive to remove this small yardage in comparison to the whole amount, and taking his statement that there was danger of the cement facing sliding into the borrow pits, all of which were recklessly stated and made, stamps Storrow's testimony as unworthy of belief.

On cross-examination Mr. Storrow testified that he had acted in the same capacity on other works as Mr. Drummond occupied on the Big Lost River Irrigation project, and as supervising engineer he always had the right to make changes in the plans where he thought it was for the benefit of the enterprise, but he is very positive that Mr. Drummond as supervising engineer had no such authority. (Rec. 262).

Storrow further stated that in his opinion the core-wall as constructed was not sufficient, for the reason that it had not been built upon impervious material or solid rock, yet the foundation for this core-wall was laid out by Mr. Coy, whom counsel for defendants trustees says performed all his duties, and that while Coy was there the contractor did work according to the plans and specifications.

The plans and specifications call for a solid concrete core-wall running through this dam in the center for nine hundred feet. This core-wall was designed and intended to cut off all water, and this core-wall did not need the assistance of any impervious material, on either side of it to accomplish that very purpose. Of course, if the core-wall was not built on impervious material, then putting in impervious material above the ground on each side of the core-wall would not accomplish the purpose intended, so that the inevitable conclusion is from Storrow's testimony that the fault lay in not building the core-wall on impervious material, and according to his own testimony, something else would have to be done to cut off this flow of water which would naturally seep under this core-wall.

We would direct the Court's attention to the cross-examination of Mr. Storrow, as found on pages 261 to 266, and also as found on pages 343 to 353, and

to note the evasions to which he resorted in answering direct questions on cross-examination.

On cross-examination we asked him if he had not made a report to Mr. Riley as to how much it would cost to complete this structure, and he said that he had, according to his best memory, it was \$675,000. (Rec. 344). He stated that he had his report in court; that he would not look at it, and he was further asked if he had not stated in his report that the cost would be \$550,000, and he answered "No sir." (Rec. 344).

On cross-examination he further testified I told Mr. Riley, either verbally or in the report, that the work which it would be necessary to do at the Mackay dam in order to make a serviceable dam of it was divided into two lines, one——

Q—Will you get your report and read from it?

A—No, I decline to.

Q—Are you now testifying from your recollection?

A—I am testifying to what is in the report. (Rec. 345).

* * * * *

Q—What was your estimate on the new dam?

A—I have forgotten the exact figures. The first cost is higher than the cost of repairing the Corey dam, but, as I have just told you, I advised Mr. Riley that the ultimate cost would be less, al-

though the first cost would be a little more, that is, the apparent first cost.

Q—You have that report in court in front of you, will you state what you reported to Mr. Riley the new dam would cost?

A—I do not have that report in front of me.

Q—It is on the table, isn't it?

A—I do not know; I am not looking at the table; I am looking at you.

Q—I will ask you to look at the table.

A—That is not my copy of my report. That belongs to counsel; that is not my copy.

Q—But you know that a copy of your report is here?

A—Yes sir. (Rec. 346 and 347).

Witness refused to look at his report to see whether the sworn statements that he was making from memory were justified by his written report. He refused to let counsel for plaintiff see that report and tried to hide under the excuse that this report was a private communication and therefore privileged. (Rec 348).

We have a right to believe that Storrow when he was on the stand knew that the oral testimony that he was giving concerning his report that he had made to Mr. Riley was false, and that he was afraid either to show that report to counsel for plaintiff or to read that part of the report that re-

lated to the old dam and what his recommendations were concerning the rebuilding of it. Hiding under the shield of a pretended private communication in this case at that time, we do not believe will aid the truthfulness of this witness, and if his counsel are willing to let their witness rest under this imputation that he was swearing falsely and that his report would show it, we most certainly can, and we charge him at this time with false swearing concerning what his report was to Mr. Riley as to the condition of this dam and the work as he found it, and what recommendations he had made.

On page 348 the following proceedings took place.

Q—Did you further report: “The procedure for this design is to build a dike across the stream bed up stream from the present dam, so as to give access to the proposed trench, then to cut this trench by a steam shovel along the whole 2000 feet of the face of the dam, cutting to such depth, not less than 20 feet, as the finding of the cutting itself may show necessary; the material so excavated to be used for filling in the body of the dam itself. At the same time the present concrete face of the dam will be stripped off. When the proper time comes, after the trench has been fully excavated, it will be sluiced full of fine material washed out of the body of the present and accumulated fill. Thus the dam will

be changed from its present design by the addition of a great blanket of strong and impervious material on its up stream face." Did you so report?

A—That is part of the report I have just testified I made. It is explanatory of what I have just told you, and taken by itself, it utterly mis-states the tenor of my report.

According to this statement Mr. Storrow believed that it was necessary to go up stream and to build a trench down to impervious material, which would be bedrock or clay, and which would be 20 feet deep or more in order to cut off the underground flow of water, and which the core wall does not cut off, and we think this is the true reason why it would be impracticable to take out the material next to the core-wall and put it back in, for the reason that doing that work would not stop the dam from leaking, and not because the cost of taking out this material and placing it back would be prohibitive. These statements of Storrow concerning the prohibitive cost of removing the gravel around the core-wall; that there was danger of the face of the dam sliding into the borrow pits when the borrow pits are higher than the toe of the dam, and his refusal to look at his report and to see that the statements that he was making under oath were correct, brands Mr. Storrow as a juggler of the truth.

On his direct examination Mr. Storrow testi-

fied that it would cost \$100,000 to rebuild defective concrete on the drops in canals; half of that would be for putting in those piers. (Rec. 259).

Mr. Lynch who had the contract for putting in these piers and which was cut out of his work by the engineers in charge of the Big Lost River Irrigation Company to save expenses, says that he will put in all of these piers according to the plans and specifications for \$5,000. (Rec 421).

Mr. Storrow was again asked if he had examined the head works of the Blaine canal, and whether he had compared them with defendants trustee's Exhibit 6, which is a drawing accompanying the specifications, and that he found a variation between the specifications and the way the head works were built, and we quote his answer in full.

“A—One of the principal variations is that the spillway in the headworks, intended to pass the floods, which are not wanted in the canal, and must be kept out by it, is shown on the drawing to have a width of 150 feet and a depth of 7 feet, effective waterway, whereas, as a fact, it is 125 feet along its crest instead of 150, by the same depth, of 7 feet. Another principal trouble, another principal difference from the specifications is that a wall carried up to a height of 7 feet above the crest of the above-mentioned weir is shown on the drawings to have a length of 100 lineal feet, extending from the intake

of the Blaine canal outwards into the river towards the left bank of the river, for a distance of 100 feet, and thereby separating the overflow weir from the headgates by a high, strong concrete wall 100 feet long, whereas, as a fact, I found that the structure was built without that wall, or any wall whatsoever, excepting only such wall as formed part of the headgate known as the Darlington headgate, which has been introduced in place of this wall, and which is not shown in any way whatsoever on the specifications and drawings. I find that the drawings to which I have just referred show a gateway or sluiceway is called for at the right hand end of the overflow weir, where the 100 foot wall just mentioned and the weir come together, that is to say, on the right hand end, looking down stream, as we always do, at the right hand end of the overflow weir; this mud-way or gateway or sluiceway was actually built at the left hand end." (Rec. 259).

It is true that those headworks were not built according to the plans and specifications filed by the Big Lost River Irrigation Company with the State Land Board. The evidence, which is uncontradicted, shows that a blue print was delivered to us signed by the chief engineer calling for a spillway 125 feet across, and that instead of a wall seven feet high by one hundred feet long the plans and specifications that were furnished to us signed by the

chief engineer called for a wall only fourteen feet long; that instead of there being a mudgate or sluice-gate upon these plans and specifications that were delivered to us, there was none, and the engineers on the ground designed and had our subcontractor put it in. (Rec. 418.)

Again objection is made to the work as it is done at the bifurcation works of the Blaine canal. Mr. Storrow testifies that there was a certain wall built above the gates which was not in accordance with the plans and specifications. This is true, but Mr. Drummond testifies that the plans for putting in this work were submitted to the office at Chicago and that those plans were approved, and that the work was put in by Corey Bros. Construction Company according to the plans and specifications furnished by the engineer. Mr. Storrow is very positive in stating that this curtain wall was the cause of the wreck that took place upon the Blaine Canal during the spring of 1911.

We put Mr. Henderson, an employe of the receiver in this case, and an engineer, upon the stand, who explained in detail the cause of the Blaine wreck, and contradicts the dreams and imagination of Storrow. (Rec. 437, 438, 439.)

When this accident happened to the Blaine canal one of the gates at Antelope crossing had been partially left open, which let the water from Antelope

Creek into the Canal, and Mr. Henderson in trying to shut down this gate to keep the floods from cutting out the bank at Antelope crossing was unable to close the gate, and in order to relieve the pressure at that point, he opened both of the gates leading from Antelope Creek into the canal. This let the water down into Blaine canal, and the dirt around the cement structures having not been put in and the banks not being completed, this water worked in behind the cement work and tore it out. In full explanation of this accident we would call the court's attention to Mr. Henderson's testimony, found on pages 437-440.

Mr. Henderson further testifies that he examined all the cement work done upon these canals prior to this accident on the Blaine canal, and all of it was in first-class condition, and he exhibited photographs which are introduced in evidence, and to which we call the court's attention, being marked plaintiff's Exhibits Nos. 98 to 106.

To go back to the dam and to discuss a little further the manner of dumping material into the body of the dam counsel for defendants' trustees in his brief says that the specifications called for a trestle to be built in the upper and lower toe of the dam, and that material should be dumped from this trestle, and to quote his brief, he says:

“The contract between complainant and the Irrigation Company provided that the ma-

terial from the borrow pits might be dumped from trestles 25 feet high, provided, those trestles were two in number only, one in the lower toe and the other in the upper toe of the dam, and both parallel with the core wall, and that all dumping should be done from these parallel trestles **towards** the core wall." (p. 24.)

Under paragraph 8 of the detailed construction of the dam we find the following:

"Forming Embankment:

"Embankment may be formed either by the use of teams or by steam shovels and cars. In case the material is placed by means of steam shovels and cars the contractor may either raise the embankment by shifting track, or by placing two trestles; one in the lower toe, and one in the upper toe of the rising embankment." * * *

"The material between the trestles **may** be dumped from the cars toward the center of the dam, taking the general slope determined by the angle of repose of the material as dumped; the only limitation being that each trestle shall be used to the extent that practically the same weight of material is carried towards the center of the dam from each trestle."

This limitation was put into this contract for the purpose of having the dam erected uniformly, so that the pressure on each side of the core wall would

be uniform; thereby the core wall would not be sprung or broken.

This contract says that the material between the trestles **may be dumped** from the cars towards the center of the dam. It does not say that it shall be, and this last interpretation is put upon this contract by counsel for appellants' trustees and by their experts for the reason that it helps sustain their case.

This contract was furnished by Mr. Rosecrans, the chief engineer to Mr. Corey, and if there is any presumption to be indulged in Rosecrans drew this contract and he would be as well able to interpret its meaning as well as any other expert engineer. When he was at the Mackay dam in the summer and fall of 1909 he saw how the material was being dumped and he approved of that manner.

These engineers who represented the Big Lost River Irrigation Company were something besides mere inspectors to see that the work was done according to the written contract; they were the agents and superintendents for the Big Lost River Irrigation Company in constructing this work. They gave directions before the work was started how it should be done. They were in the field all the time directing and supervising this work, but we will argue this phase of the case a little further on more extensively.

We will agree with counsel that the effect of dumping material from a trestle 25 feet high that the

coarser material would naturally reach the bottom first. This is due to the law of gravitation; that the heavier material falls faster and goes to the bottom, and that the finer, lighter material remains on top. The result would be the same whether the trestles were parallel to the core wall or at right angles. Dumping from trestles parallel to the core wall would cause the coarse material to go towards and against the core wall.

This contract in its written specifications does not say that a stream of water shall be poured upon the dump so as to wash all the fine material towards that core wall, that is an interpretation devised by counsel and his engineers, which would be a reasonable interpretation we are ready to admit if the contract did not specifically define what portion of the dam should be wetted.

We are willing to admit that it would have been better to have wetted this dam completely over during its construction that the voids and holes should have been filled up with fine material, but the specifications and the orders of the engineers to us did not require it. All this wetting was done at an extra expense to the Big Lost River Irrigation company and its agents and superintendents, who were the engineers in charge, interpreted this contract and gave us explicit orders how it should be done, and the testimony is that we followed those orders.

Let us now pass on to the testimony of Paul S. Roberts, one of the witnesses called on behalf of the appellants' trustees, and in discussing Mr. Roberts' testimony, we may incidentally discuss a part of Storrow's testimony.

Mr. Roberts was a Carey Act inspector for the State of Idaho and commenced work inspecting this dam in the month of March, 1910. (We would call the special attention of the court to Mr. Roberts' cross-examination, commencing on page 273 and ending on page 342). On April 27, 1910, he made his first report on the Big Lost River Irrigation project to the State Engineer. (Rec. 275.) In that report he makes certain recommendations of matters that were not in the plans and specifications on file, and points out to the State Engineer how certain work should be done. In that report he speaks of the concrete work and says that the concrete at the end of the tunnel is complete and is free from cracks and checks and finished in a thorough and workmanlike manner. He further says:

"I would suggest that the present retaining wall of concrete on this side of the controlling valves be extended fifty feet to prevent this erosion. (Rec. 276).

This suggestion made by Mr. Roberts was not in the plans and specifications on file with the State Engineer for the building of these works. Further on in his report he says:

"On April 26th the water in the reservoir had covered an area of 60 or 70 acres and the tunnel and controlling valves were flowing full and water along the face of the dam had covered the concrete apron for a distance of 32 feet, measured along the slope. As the water in the river is steadily rising it will cover more and more of this apron, preventing the placing of another layer of concrete to increase the thickness of the apron, as recommended." (Rec. 279.)

"Horizontal cracks have developed in this concrete apron, at the water line, and extends along the entire face of the apron. At the corner of the apron, where it turns back along the east portal of the tunnel, there is a vertical crack extending from the water line down the surface of the apron. The concrete on the dam side of this crack has settled below that on the portal side about four inches. This is due to the fact that the water getting under the apron at the bottom of the dam caused the material in the dam to settle away from the apron. **This cracking and local settling of the facing along the dam, I do not consider serious,** except that it indicates the necessity of making this facing six inches thick, as recommended in Mr. Fell's report of April 2, 1910." (Rec. 279.)

"Work on the spillway tunnel is progressing rapidly." (Rec. 279.)

He further says:

"He made no mention in this report to

the State Engineer that the irrigation company was not carrying out their contract with the state." (Rec. 280.)

"A force of carpenters were keeping well ahead of the concrete work with forms. The concrete in the finished structures is well put in and free from cracks and checks." (Rec. 284.)

"The concrete syphons on the north and south forks of the Antelope Creek crossing are finished. The forms are removed from the concrete on the north fork crossing, and partially removed on the south fork crossing. Temporary gates are installed in both syphons." (Rec. 284).

"The entire work is progressing as rapidly as possible and with the exceptions noted **is in good condition. The canals will be ready for water at the specified time.**" (Rec. 292.)

So according to this report as made by Mr. Roberts, while he was a Carey Act inspector of the State of Idaho, he had no fault at this time to find with the work being done on the Big Lost River project, except in minor details, which could be easily remedied.

On May 20, 1910, Mr. Roberts writes the following letter:

"Hon. D. G. Martin, State Engineer.

"Sir:

"I have been unable to locate a set of the specifications stamped with the state's ap-

proval for this work of the Big Lost River project. Mr. Drummond, the engineer on the work, has told me repeatedly that they were somewhere on the work, but my efforts have been unable to locate them. In view of the many rumors current here of injunctions by the railroad company and others stopping the work on account of its being dangerous to property in the valley, and the general fear of the community. I believe the above specifications should be here and always available; in order to protect the state I think it advisable to stop the work if necessary till the specifications are produced, and I ask for authority to do this. Mr. Drummond contemplates a change in the construction of the core-wall which does away with the sheet steel piling in the last 50 ft. of the wall and instead of the piling excavating to a depth of 10 or 12 ft. before placing the concrete. The reason for this change is that boulders prevent the driving of the piling. I believe it to be a better construction to continue the steel piling as originally planned, and remove all boulders until the piling will drive to place. I told Mr. Drummond that I would not assume the authority for the change and for him to submit the change to you for your approval before going ahead. Respectfully," (Rec. 293.)

In this letter Mr. Roberts speaks of the many rumors current of injunctions by the railroad company and other persons to stop this work, and he

advises also that work be stopped until he could procure a copy of the specifications that Mr. Drummond—the engineer in charge—contemplates making a change in the construction of the core-wall. It is not Corey Bros. making the changes.

On May 27, 1910, he reports as follows: (Record 295.)

AT THE MACKAY DAM.

“The first, or foundation, section of the concrete core-wall, across the old channel of the river, is completed to within 100 feet of the west end of the dam. Before the concrete was placed, the earth in the forms was excavated to a firm foundation, which was from 5 feet to 7 feet below the top of the sheet steel piling. This allowed the concrete to take a firm bond with steel piling. There was several feet of water, but no flow, in the forms at the time the concrete was put in. The placing of the concrete began at the end of the section where the old concrete had stopped, and the new concrete was pushed down the slope of the old concrete into the water, continuing in this manner to the end of the forms. This method prevented any separation of the cement and gravel in the concrete. **At the center of the old river channel temporary openings are left in the core-wall. These openings are one square foot in area and spaced vertically two feet apart.** This is to allow a passageway for the considerable amount of water that seeps through the gravel embankment in

front of the core-wall. This water is now diverted around the core-wall. The second lift of the core-wall is being placed as rapidly as the foundation section has become hard. Two concrete mixers are being used and the work pushed as rapidly as possible.

“Film No. 5, Roll No. 1 shows the form work and concrete on this section of the core-wall.

“A force of men is removing the earth and loose rock from the cliff where the core-wall will join the solid rock on the west end of the dam.

“Work on the first and second lifts of the earth embankment in front of the core-wall is progressing simultaneously and as rapidly as possible. The first lift is nearly completed as far as the core-wall will allow, and the upstream section of the second lift is finished to within a hundred and fifty feet of the west end of the dam. Six gravel trains are now in operation on this work—the sixth locomotive being placed in commission on May 17.

“Film No. 4, Roll No. 2 shows the work on this part of the construction, and Film No. 6, Roll No. 2 shows the method of transporting the sixth locomotive from Mackay to the dam.

“The excavation of the tunnel section of the spillway channel is completed. There remains about twenty feet of open cut work to complete the entire excavation of the spillway channel.” (Rec. 296.)

He concludes this report on May 27 by stating:

“The work in general is in good shape and progressing rapidly.” (Rec. 303.)

On June 28, 1910, Mr. Roberts makes another report to the State Engineer. (Rec. 307.)

“Mackay, Idaho, June 28, 1910.

BIG LOST RIVER LAND & IRRIGATION CO.

Hon. D. G. Martin,

State Engineer,

Boise, Idaho.

Sir: I beg to submit herewith report on the progress of the work of the Big Lost River, Land & Irrigation Co.

MACKAY DAM.

“The up-stream section of the second lift of the embankment was finished on June 2nd and the dumping toward the core-wall, with the necessary shifting of track, begun. On June 3rd the water had risen in the reservoir, until it stood several feet above the base of this second lift. **The large stones which formed the base of this lift allowed the water to pass through the embankment. This seepage amounted to fifty second feet. In order to stop this seepage, a stream of water was played on the upstream face of the embankment and the foot of the embankment was puddled sufficiently to stop all seepage at this point.**

“Film No. 4 shows the dumping on the second lift toward the core-wall.

“The upstream face of the second lift of

the embankment has been dressed to proper slope.

“The steel sheet-piling was continued from the intended point of stopping, a distance of 80 feet to the base of the rock cliff at the west end of dam. The lengths of piling ranged from 18 feet at the river end of this section to 9 feet at the cliff end. **Each pile was driven to refusal, the last foot with considerable difficulty, indicating a compact stratum at the foot of the piling.**

“After the forms for the concrete were in place around the sheet-piling, the gravel within the forms was excavated to a firm foundation for the concrete. This excavation was about five feet below the original surface of the ground. Considerable water stood in the forms, and the concrete was so placed as to cause no separation of the cement and gravel.

“From the end of the sheet-piling, to the perpendicular face of the rock cliff, **the earth and float-rock was removed to solid rock. A** centrifugal pump working continuously during the excavation, kept the considerable amount of seepage water pumped out which allowed this excavation to be easily and thoroughly done.

“Film No. 3, Roll No. 3 shows the foundation course for the core-wall being placed, and Film No. 2, Roll No. 3 shows the excavation in the rock for the core-wall at this end of the dam.

“Film No. 5 and Roll No. 3 shows the first

lift of the embankment at the lower toe of the dam. This lift is completed to within 100 feet of the west end of the dam.

“Film No. 1, Roll No. 3 shows the wooden covering over the three valves at the outlet tunnel, next to the rock. This covering is made of 12 by 12 inch timber uprights, with 12 by 12 inch timbers placed close together forming a tight roof. The timber are fastened together with half-inch iron dowel pins, 16 inches long, driven with sledges. The other three valves will not be covered.

“Film No. 6, Roll No. 3 also shows the method of forming the second lift of the embankment toward the core-wall. It also shows the concrete gang taking the material from the embankment for the concrete of the core-wall.

“This view further shows the trestle being built for the third lift of the embankment toward the east end of the dam. This trestle extends from the present end of the third lift at the upstream face of the dam, across the embankment and core-wall at an angle of forty-five degrees, to the lower side of the dam, dumping at the upstream end of the trestle. It is the intention of the contractor to begin where the third lift now ends, and continue across the dam to the lower side and then parallel to the dam to the cliff at the west end.

“This method is directly opposed to the specifications which say: Page B13, paragraph 8, Forming Embankment—by placing

two trestles, one in the lower toe, and one in the upper toe of the rising embankment.— The material between the trestles may be dumped from the cars toward the center of the dam, taking the general slope determined by the angle of repose of the material as dumped; the only limitation being that each trestle shall be used to the extent that practically the same weight of material is carried toward the center of the dam from each trestle.’ It is obvious that the intended method of forming this portion of the third section of the embankment will not cause the same weight of material to be carried towards the center of the dam from each trestle. I took this matter up with Mr. Jones, the engineer of the work, but he seemed to think the intended plan was all right, in that it was easier for the contractor to do it this way. I insisted that the specifications be followed strictly.

“No work has been done on the spillway, as the blasting rolls rock and dirt into the excavation for the core-wall below the spillway, preventing the continuing of work on the core-wall.

“Work on the dam has been considerably delayed during the last month on account of delayed shipments of coal.” (Rec. 320.)

Mr. Roberts then proceeds to give his report on the Era, Arco and Powell tracts.

He concludes this report by saying:

“On June 17, Mr. J. B. Lippincott, engi-

neer of Los Angeles, Cal., arrived at Mackay to make an investigation of the conditions at the dam, in the interest of residents and property owners of Mackay. Mr. Lippincott's investigation was most thorough, ending on June 20, at Blackfoot with an interview of Mr. Munson who did the boring at the dam site for bed rock. Mr. Lippincott's report, which will not be favorable, is expected about July 10." (Rec. 316.)

Mr. Roberts further testified that he was a public officer at the time he made these reports and that he had a public duty to perform and that he did perform it.

In analyzing this report of Mr. Roberts, dated June 28, 1910, we find that the contractor was dumping gravel in accordance with the specifications toward the core-wall. That the sheet-piling was driven to refusal, indicating a compact stratum at the foot of the piling. That the forms for the concrete around the sheet-piling was excavated to a firm foundation. That from the end of the sheet-piling, to the perpendicular face of the rock cliff, the earth and float-rock was removed to solid rock, and that pictures were taken showing all of these conditions, which were forwarded to the State Land Board, and in this report we first find that Corey Bros. Construction was crossing the core-wall with their railway at an angle of 45 deg., and was threatening to dump material on a 45 deg. angle to the core-wall. It appears from Mr.

Storrow's testimony that about 1500 or 2000 yards of material was dumped from this track. It appears from Mr. W. E. Corey's testimony that about 1000 yards was dumped from this trestle, so this is the first material that was dumped from a trestle not parallel to the core wall. It is true that Mr. Storrow and Mr. Green said that they found indications that other material had been dumped from tracks not parallel to the core wall. How these people could look into an embankment of dirt 2000 feet long, 600 feet wide and 50 feet deep and tell how much material below the surface had been dumped from trestles not parallel to the core wall, is more than counsel can explain.

On August 27, 1910, Mr. Roberts made another report upon the Big Lost River Irrigation Company, in which he says:

"All excavation and embankment on the entire system is exceedingly well done. With the exception of a few cases of faulty concrete work, as noted in previous reports, the structures which are now completed are well built. At the present time there is no work being done at any point on the entire project."
(Rec. 342.)

By the reading of these reports it will appear that the state was fully aware of how all this work was being done, and that it approved of all the work in its principal details, except when it compelled the

Big Lost River Irrigation Company to stop work on the dam on the 19th day of July, 1910.

The minutes of the Big Lost River Irrigation Company were introduced in evidence and show that soon after the Big Lost River Irrigation Company was organized, to-wit, July 16, 1909, that George S. Speer became owner of practically all of the stock of the corporation. (Rec. 586.) George S. Speer was the vice president of Trowbridge & Niver and had been very active in the organization of the Big Lost River Irrigation Company, and as the evidence shows was taking a leading part in financing said company. Mr. Speer lived in Chicago, the same city where the Arnold Company resided, and according to the testimony of Mr. Rosecrans, the Arnold Company was looking to Trowbridge & Niver for its pay. (Rec. 378.) This is the testimony of Mr. Rosecrans, so it is not presumptuous to indulge in the speculation that Trowbridge & Niver and Mr. George S. Speer were keeping themselves informed of the progress of work done upon this system from the Arnold Company; in fact, the Arnold Company furnished to Trowbridge & Niver a copy of all the estimates that it furnished to Corey Bros. Construction Company. It would be for the interest of Trowbridge & Niver before they paid Corey Bros. Construction Company its estimates to know that said estimates were correct, and that Corey Bros. Construction Company was doing its

work according to the contract. There was much correspondence passing between Trowbridge & Niver, George S. Speer and Corey Bros. Construction Company, and we would call the court's attention to this correspondence which is found in the Exhibits, and which has been transcribed.

Plaintiff's Exhibit 94 (Rec. 555) is a letter dated March 12, 1910, from Trowbridge & Niver, signed by George S. Speer to Corey Bros. Construction Company, and in part reads as follows:

“We are pleased to note that you are organizing your forces on the Lost River and that you will be at work in a short time with full forces. Have written the State Engineer of Idaho requesting him to make a trip of inspection in the near future and to report the progress that was being made, so that if there was reasonable assurance that water would be available for all the farmers who needed it by May 1, that the company could send out the necessary thirty days' notice to the land owners and thus come under the wire for the spring of 1910. We sincerely trust that you will be able to convince the State Engineer that you will be able to deliver water by May 1, even though the reservoir and some other parts of the project may not be entirely completed by that time.

“This will make the quickest Carey Act project ever constructed and ought to be a splendid advertisement for both Corey Bros.

and Trowbridge & Niver Company and we wish to compliment you on the way in which you have handled the work and only regret that you were not the successful bidder on the Colorado Southern project."

On March 29, 1910, Trowbridge & Niver, through George S. Speer, again writes to Mr. W. W. Corey, in which Mr. Speer states that they understand it will be impossible to deliver water on all the contracts by May 1, and he winds up the letter by saying "we fully appreciate the strenuous efforts which you are putting forth for the completion of this work." (Rec. 556.)

In none of this correspondence does Mr. Speer or Trowbridge & Niver find fault with the way in which this work was being done.

Work was stopped upon this dam by order of the State Land Board about July 19, 1910; after this work was stopped the Arnold Company delivered to Corey Bros. Construction Company on the 31st day of July, a certificate for all work done upon this dam, and for all work done upon the whole system.

On August 31 the Arnold Company issued another certificate signed by their engineers that there was so much due for work done, and it is upon these last certificates that we are basing the amount of our recovery.

Does counsel mean to say to this court that the

Arnold Company or that Trowbridge & Niver or Geo. S. Speer or the Big Lost River Irrigation Company did not know what the true condition of affairs were? The state stopped work not that Corey Bros. Construction Company was at fault, but because the Big Lost River Irrigation Company was at fault. If the Corey Bros. Construction Company were at fault, would not the Big Lost River Irrigation Company and the Arnold Company have been only too glad to have placed it upon the shoulders of the contractor?

Under this contract between Corey Bros. Construction Company and the Big Lost River Irrigation Company all the work must be done to the satisfaction of the engineers, and any work done or material furnished by the contractor could be condemned and thrown out.

If Engineer Drummond was so complacent and was so corrupt as the defendants' trustees would infer that he was, why haven't the Big Lost River Irrigation Company and the Arnold Company repudiated his actions? This cry put forth by the defendants' trustees that Drummond was corrupt and that Corey Bros. Construction Company was a main party to that corruption is nothing but a false issue injected into this case to distract the court's attention from the true issues. If Drummond was corrupt, then we have Mr. C. B. Hurtt, president of the Big Lost River Irrigation Company, Mr. George S. Speer, one of the

directors, Mr. James E. Clinton, the receiver of this court, condoning and confirming that corruption.

We have evidence in this case that neither Mr. C. B. Hurtt, president of the Big Lost River Irrigation Company, nor has any other officer found fault with the contractor's work. Neither have they made nor do they now make any claim for damages on account of the work done by Corey Bros. Construction Company. (Rec. 451.)

On July 15, 1910, the State Board of Land Commissioners entered an order that the Big Lost River Irrigation Company discontinue all work on the Mackay dam. Part of that order reads as follows:

“It appearing from the report of State Engineer and from the Carey Act Inspectors, that the construction company in the construction of the Mackay dam is not complying with the specifications of the said contract with the state, and that their attention has been repeatedly called to the fact by the said State Engineer and objections to the said construction having been made and requests that the said company perform said work in accordance with the contract and the plans and specifications approved, and that said company has failed and does now refuse to comply with said specifications and said contract, and to construct the said dam in accordance therewith:

“Be it Resolved, That all work upon said dam be discontinued and disapproved until the same is constructed in accordance with the

said contract and with the approval of the State Engineer.”

From reading this resolution it would appear that the State Land Board on an ex parte complaint, made to it by the State Engineer, stopped work.

Mr. Paul S. Roberts was the Carey Act Inspector and was the officer who made the reports on the construction of this dam.

On May 20, 1910, Mr. Roberts wrote to the State Engineer that he was unable to find a copy of the specifications and he asked for authority to “stop all work until the specifications are produced.”

On May 27, 1910, Mr. Roberts again made a report to the State Engineer, and in that report he has no serious objections to the dam or any of the system.

On June 28, 1910, he makes another report to the State Engineer and in this report he finds fault with Mr. Drummond, the engineer, and states that it is the intention to dump gravel from a track crossing the core wall diagonally, and he recommends that this method be not permitted. This is the first serious objection that any of the engineers representing the state has made, and as this record shows it was upon this evidence that the State Land Board stopped the Big Lost River Irrigation Company from doing any more work on the dam until it should comply with the plans and specifications. This was something that could be easily remedied and the gravel that had been

dumped from this track could easily have been removed and Corey states in his testimony that he would have been willing to have removed it if the engineers should demand it. This being the first serious objection that the State Engineer had in the construction of this dam and canal system, it is fair to presume that there were no serious objections prior to June 28, and that the State Engineer's office approved the manner and method of doing this work.

Mr. Roberts speaks in one of his reports that the citizens of Mackay have employed Mr. Lippincott, an engineer, to inspect this dam, and that he understands that Mr. Lippincott's report is not favorable. What Mr. Lippincott's report is does not appear in this evidence, but it is safe to conclude that the State Land Board was induced to stop work on this project on account of the action of the citizens of Mackay rather than upon any report made by Mr. Roberts.

A casual reading of the contract and specifications drawn up by the Arnold Company, and which was signed by the Big Lost River Irrigation Company and Corey Bros. Construction Company show that said contract in its terms are indefinite, contradictory and misleading, and in pointing these inconsistencies out, we will use the language of an eminent engineer who made a report to the State Land Board of Idaho upon this contract.

“Mr. Lippincott has said in his report that the specifications are misleading. We consider that he has been very mild in this statement. They are not only misleading, they are incomplete, indefinite, contradictory, and erroneous. They are silent where they should specify, and, when they specify, they sometimes specify wrong methods;

“They are **incomplete** because they omit some of the most important details necessary for the successful construction of a dam; as, for instance, the method of mixing the various ingredients of which the body of the dam and the puddle core is composed.

“They are **indefinite** because they do not **define**; as, for instance, where they speak of the ‘material’ of which the puddle core is to be composed without mentioning what it is. And both indefinite and **erroneous**, in stating that ‘there is an impervious bed of clay and ‘gravel’ underneath a bed of gravel (about 2000 feet long) ‘averaging about 15 feet in thickness.’ They should have stated the maximum and minimum depth of this layer of ‘impervious clay and gravel,’ and its thickness. Obviously if it were only an inch thick, one would not take the risk of founding an important structure upon it. Again, when they say that a “trench is to be backfilled with **material**’ without specifying what this material is to be, or how it is to be placed.

“They are **contradictory** when they call for a method of placing the material in the dam

which shall insure a mixture of the materials, and specify a method of placing it which will effect a separation instead of a mixture. Again, where they specify 'earth' as a 'mixture of earth and gravel containing over 10% of earth' in par. 4, clause 4, sec. 11, and 'gravel' as 'all gravelly material' containing 90% of clean washed gravel' in the very next paragraph. According to the specifications, if the material contained exactly 10% of earth and 90% of gravel, it would be 'gravel;' but, if it contained 10½% of earth and 89½% of gravel, it would be 'earth.' One would naturally suppose it was still 'gravel.' This classification, although not absolutely contradictory, is so near it as to show that the writer of the specifications had no clear conception of the difference between earth and gravel. Earth and gravel properly mixed and placed in an earthen dam, will make a water tight structure, but material containing 90% of gravel, dumped promiscuously in a heap, without any attempt at mixing or proper compacting, will not do so.

“The specifications relating to the formation of the dam are entirely inapplicable to the material of which this dam is composed. With its aggregates properly segregated and disposed, this material might have been built into a water-tight structure, and it is possible that the foundation might have been rendered secure from the passage of large amounts of water through or under it, but these things

could not, and have not, been done under these specifications.”

* * * * *

“There is no provision in the specifications for making the body of the dam tight, but great reliance seems to have been placed on saturating a portion of the same material used for the body of the dam, and thus creating so-called ‘puddle material’ in the center of the dam.

“There is no definition of ‘puddle’ or ‘puddling material’ in these specifications—a fatal omission. It is vaguely alluded to as ‘the material’ in clause 8 of the 4th section, and the only inference that we can draw from this definition is that the material alluded to is that of which the dam is composed, viz: gravel with 10% of clay.”

We have no hesitancy in stating that if the work done by Corey Bros. Construction Company upon the dam of the Big Lost River Irrigation project is a failure that such failure is entirely due to the engineers of the Big Lost River Irrigation Company. The engineers of the Big Lost River Irrigation Company changed the open spillway to a tunnel spillway, and this was a saving to the Big Lost River Irrigation Company of about \$3,000.00 or \$5,000.00. (Rec. 431.)

The evidence further shows that the engineers cut out some of the piers on the main canal and other cement work and that this was a saving to the Big

Lost River Irrigation Company of \$30,000. (Rec. 422 top of page.)

There is no evidence in this record but what the contract that Corey Bros. Construction Company had for the doing of this work was a profitable contract and according to the testimony of Mr. W. W. Corey, his company would only have been too glad to have made an open spillway, to have put in the cement piers and to have done all the other work which the engineers cut out in order to save expense. (Rec. 430, 431.)

Engineer James A. Green, an expert called on behalf of appellants' trustees, on his direct examination said that he should judge that approximately 40,000 or 50,000 yards of material had been dumped in the dam from trestles crossing the core-wall at an angle, and that he estimated that ten second feet was percolating through the dam, and that this water had to percolate through six hundred feet of fill from the upper to the lower toe. (Rec. 403.) On cross-examination, he said that he roughly estimated the amount dumped from diagonal tracks to be 40,000 to 50,000 cubic yards and that 150 cubic yards was dumped parallel to the core-wall. (Rec. 407.) How the other 420,000 yards were dumped, he does not attempt to explain. He further says that he did not measure the water coming through the dam, and that there was a hole through the core-wall; that

he measured the water by guess. (Rec. 409.) He further stated that he could not tell from looking at defendant's Exhibit No. 1 (which was a blue print drawing of the dam), how deep the trench was to be dug for the core-wall, yet within three minutes afterwards on re-direct examination he says that the blue print shows that the core-wall was to be six feet below the original ground. (Rec. 408-409.)

Engineer W. F. Day, an expert witness called on behalf of appellants' trustees, said that there was from five to ten second feet coming through the dam, and that there was a hole in the core-wall. (Rec. 411-412.)

We do not deny but what there was water coming through the dam and that there were holes in the core-wall. It was necessary to leave these holes in the core-wall in order to construct the dam. Those holes were in the core-wall when Storrow was there and when Binckley was there and when all the other engineers were there, and the water was flowing through this core-wall. These holes are still there and probably always will be there, unless this dam is completed. It was the intention of the builders of this dam and of the engineers that as soon as possible that these holes would be filled up with concrete.

On May 27, 1910, Paul S. Roberts, Carey Act Inspector, and one of appellants' trustees' witnesses

reported to the state engineer as follows: "At the center of the old river channel temporary openings are left in the core-wall. These openings are one square foot in area and spaced practically two feet apart. This is to allow a passageway for the considerable amount of water that seeps through the gravel embankment in front of the core-wall." (Rec. 296.)

On page 32 of appellants' brief we find the following statement: "And inasmuch as these specifications were identical with those attached to and made a part of the Corey Company's contract, this finding by the state was a finding that the Corey Company had in vital parts departed from its contract with the Irrigation Company."

We wish to state to this court that the evidence in this case is uncontradicted, that some of the blue prints that were furnished to us by the engineers of this company signed with the name of W. H. Rosecrans, and bearing the same number as the blue prints attached to the contract made by the Big Lost River Irrigation Company and the State of Idaho, were entirely different. About one-half of Mr. Storow's time on direct examination was taken up in reference to the canal system outside of the dam proper.

When we put the sub-contractor, James A. Lynch, on the stand, who did all the concrete work on the canals and introduced the specifications as

represented by the blue prints, we found that these blue prints were entirely different from those blue prints from which Mr. Storrow gave his testimony, and which were properly a part of the contract made between the Big Lost River Irrigation Company and the State of Idaho. (Rec. 418-419.)

I suppose counsel for appellants contend that we are to be held responsible for not having the right blue prints.

Counsel for appellant in their argument in the lower court practically abandoned all reference to Mr. Storrow's testimony concerning the construction of piers and the work on Antelope Crossing and the cement work done on the Blaine stub.

Counsel on page 35 of their brief try to minimize the effect of the engineers delivering to us different blue prints signed with the name of W. H. Rosecrans as chief engineer and bearing the same numbers as the blue prints on file in the State Engineer's office for the construction of this work by saying that these blue prints were delivered to us by sub-engineers. All these blue prints, with one exception bear the stamp of Arnold & Company, with the names of the engineers signed to them.

On page 24 of appellant's brief we find the following: "Up to the time Coy left the departures from the contract, so far as they concerned the work upon the dam, were of minor consequence when compared

with those which occurred afterwards. After Corey had gotten rid of the obnoxious young engineer Coy, and after Raschbacher had been succeeded by the very friendly Drummond, Corey began a practice upon this dam which, alone and unaided by any other departures from the contract, was sufficient to render the dam a useless structure."

Coy was the engineer in charge of the dam and he is the engineer that laid out the trench of the core wall and told Corey how deep it should be excavated.

Storrow in his testimony says that this core wall was not placed upon solid rock or upon impervious material, and the water freely passed beneath it.

Coy was there when the rock from the tunnel spillway was being dumped inside of the limits of the dam proper pursuant to instructions from Mr. Raschbacher, (Rec. 186) the engineer in charge. Coy was there when the ground was being plowed upon which the dam was to rest. Coy was there when the first material was placed next to the core-wall. Coy was there when the first wetting of the material around the core-wall was done.

Storrow found fault with all of this.

Coy says that Corey Bros. Construction Company performed its contract while all this was done, and counsel in their brief say all departures while Coy was there from the specifications of the dam

were immaterial. Counsel have stated in their brief that as soon as Corey Bros. Construction Company had got rid of the obnoxious Coy, then the company began a practice upon the dam which, alone and unaided by any other departures from this contract, was sufficient to render the dam a useless structure, and this practice was that most all of the gravel dumped into this dam was done from trestles built at right angles or diagonal to the core-wall, and the only testimony that they have in support of this contention is that Paul S. Roberts, the Carey Act inspector, says that a few thousand yards were dumped from one diagonal trestle, and that a few thousand yards might mean any number of yards up to 50,000, but exactly how many thousand yards, he was unable to state. (Rec. 334.)

Storrow says that there were about 1500 or 1800 yards dumped from this trestle. Rec. 249.)

W. E. Corey says that there were about 1,000 yards dumped (Rec. 212), and this is the only direct evidence in this whole record that we have that any other material put into that dam was dumped otherwise than from trestles built parallel to the core-wall.

It is true that James A. Green testifies that 40,000 or 50,000 yards was dumped from trestles not parallel. This testimony is also followed that there was only about 150 yards dumped parallel to the wall. What was done with the other 420,000 yards

remains a mystery as far as Mr. Green's testimony is concerned.

Coy says on cross-examination there was one or two controversies (referring to controversies between Corey Bros. Construction Company and himself). One in particular was due to the fact that they did not follow my instructions for awhile—for an hour or so they did not—finally they came around and did the work as I wanted them to do it. (Rec. 392.) From this testimony counsel for appellants have built a mountain.

Mr. W. W. Corey says in his testimony the reason that he asked Coy to be removed was because he had a controversy with my foreman, and I came along and Coy said: "Corey, if you don't make this man do as I tell him, I will shut him down in a minute." I said, "What is the matter?" and he said, "This man don't obey my orders." I said, "If he don't obey your orders, I will make him lose his job." I said, "You don't need to ask anything more of me, if you will let me know what you want." That was the substance of it. I wrote the letter the next morning. (Rec. 435.)

Mr. Corey's letter to the chief engineer, W. H. Rosecrans, and Rosecrans' reply are found on pages 545 and 547 of the record.

Mr. Corey asked for Mr. Coy's removal on the ground that he was overbearing and insulting in his

manner; nothing unusual to be found in young people who are vested with a little authority.

George H. Binckley was another expert engineer called by appellants' trustees. It appears from Mr. Binckley's testimony "that on or about the 1st of August, 1910, he left Chicago and went out to the Mackay dam to close up Arnold & Company's affairs. While there Mr. Binckley states that he had a conversation with W. W. Corey, president of Corey Bros. Construction Company, and that Corey stated to him the reason why the water was flowing through the dam was that some of the rock from the spillway had been deposited in the dam and that a concrete floor at the bottom of the concrete facing had not been put in place in the old channel of the river and that he was satisfied a good deal of water was going through in the old channel." (Rec. 394.)

W. W. Corey in his testimony states "that he probably had a talk with Binckley during the summer or fall of 1909 about the water coming through the dam. I didn't tell him where I thought it came from or where it did come from, because I didn't know then and I don't know yet. That dam is not completed." (Rec. 430.)

Binckley's testimony is very significant in one phase of it. He was sent out there by Arnold & Company on the 1st of August to close up Arnold & Company's affairs. Work had been stopped by the state

on the 19th day of July preceding, for the reason that the Big Lost River Irrigation Company was not building the dam according to the contract made between the Big Lost River Irrigation Company and the State of Idaho, not because Corey Bros. Construction Company was not building the dam in accordance with the instructions of the engineer. Arnold & Company knew that the State had closed down the work on the dam, yet it made no investigation to find out who was at fault.

On the 31st day of June, 1910, the Arnold Company furnished to Corey Bros. Construction Company a certificate for work done upon this dam for the month of July. On August 31 Arnold & Company again furnishes Corey Bros. another certificate for work done upon this system, and during all of this time there is no complaint and there is no intimation but what Corey Bros. Construction Company has properly performed its contract.

At the time this work was stopped upon this dam C. B. Hurtt, president of the Big Lost River Irrigation Company was in Chicago, and he had a talk with Mr. Rosecrans and with Ralph G. Arnold of Arnold & Company, and both of these people told him that Corey Bros. Construction Company had properly done its work and had followed the plans and specifications. (Rec. 451.)

William M. Wayman was also in Chicago at the

same time Mr. Hurtt was. Mr. Wayman was interested with Clinton, Hurtt & Company, to whom the Big Lost River Company was heavily indebted, and he had a talk with Mr. Rosecrans and Mr. Arnold and both of these people told him that Corey Bros. Construction Company had done its work and that the work was first-class, and that the company had lived up to the plans and specifications. (Rec. 448.)

It is true that their testimony is denied by Mr. Ralph G. Arnold and Mr. Rosecrans, yet taking all the surrounding circumstances, we believe that Mr. Hurtt and Mr. Wayman are telling the truth.

The state had stopped work upon the dam and Arnold & Company makes no investigation whatever to find out the cause of it to fix the blame, and Mr. Ralph G. Arnold in his testimony says, on cross-examination, "I though Mr. Corey did his work pretty well, so far as I know." (Rec. bottom of page 383.) Not one of the officers of the Big Lost River Irrigation Company has ever contended but what Corey Bros. Construction Company performed its work according to the plans and specifications under the directions of the engineers of the Big Lost River Irrigation Company.

It is true that Corey Bros. Construction Company gave Raschbacher a diamond ring. That was after he quit work on the Big Lost River project. Mr. Corey says this was done as a friendly act; that

he wanted to be on pretty good terms with him, thinking he might assist him with information or something about another job. (Rec. 432.)

On pages 37 and 38 counsel for appellants seek to explain away the refusal of Storrow to read from his report that he made to Mr. Riley concerning this dam, and the refusal to let counsel for appellees look at that report. And counsel further said that it was a private communication made for specific purposes unconnected with any issue in this case. Counsel further say: "It would seem to be a sufficient reply to this charge that counsel for plaintiff, during the cross-examination of Storrow, succeeded in getting possession of a copy of Storrow's report to Mr. Riley, and read from it with more or less accuracy to the witness."

Counsel have made this statement voluntarily to this court without any evidence to support it. And counsel further know that I endeavored to get a copy of that report, both from Mr. Storrow and from them, and was each time "turned down." (Rec. 352.) I have never seen Mr. Storrow's report or what purported to be a copy. That statement is a brazen and impudent one, recklessly made and without any evidence to back it. But this statement is no more recklessly made than about one-half of the other so-called facts stated by counsel in their brief.

Does It Lie in the Power of the Trustees to Make the Defense that Corey Bros. Construction Company Did Not Comply With Its Contract With the Big Lost River Irrigation Company?

When counsel for the trustees sought to introduce evidence under their affirmative matter, the attorney for the appellees in this case objected to any testimony offered, for the reason that there was no privity of contract between Corey Bros. Construction Company and the trustees to raise that issue, and also upon the ground that it did not lie in the mouth of the trustees to raise that issue, and further upon the ground that the trustees had not asked for affirmative relief by way of cross-complaint. (Rec. 248.)

That there is no privity of contract between the plaintiff, Corey Bros. Construction Company, and the defendant trustees needs no discussion.

If the trustees defendant are entitled to raise this issue, it is due to the fact of their relation with the Big Lost River Irrigation Company. The right of the trustees defendant to raise this issue would be no greater, if as great, as the Big Lost River Irrigation Company.

The Big Lost River Irrigation Company has appeared in this action and filed an answer and was present at the taking of testimony by its attorney.

Its answer consists of certain admissions and denials of the allegations of plaintiff's bill of complaint.

According to the estimates made by the engineers of the Big Lost River Irrigation Company and the undisputed evidence in the case, Corey Bros. Construction Company has furnished material and done work upon said canal system for the Big Lost River Irrigation Company amounting to the sum of \$1,214,003.51; it has been paid the sum of \$691,119.48, leaving a balance due to Corey Bros. Construction Company from the Big Lost River Irrigation Company of \$522,884.03 together with interest. That Corey Bros. Construction Company performed work and furnished material for the Big Lost River Irrigation Company, and that it has not been paid in full is not sought to be denied by the trustees, and the question arises if Corey Bros. Construction Company has not performed its contract and the defendant Big Lost River Irrigation Company has been damaged by the neglect and fault of the plaintiff, how could the Big Lost River Irrigation Company raise that issue, if it had sought to raise it?

If this action had been brought in the state courts and Corey Bros. Construction Company had proven the same facts as it has proven in this case, Corey Bros. Construction Company would have been entitled to a judgment, unless the Big Lost River Irrigation Company had set up by way of off-set or re-

coupment that on account of the failure of Corey Bros. Construction Company to perform its work according to its contract, said company had been damaged, and it would have been incumbent upon the Big Lost River Irrigation Company to prove by a preponderance of the evidence that Corey Bros. Construction Company had not complied with the terms of its contract, and to further prove the amount of damages that it had suffered thereby, and the difference between what Corey Bros. Construction Company claimed to be a balance and what damages the Big Lost River Irrigation Company had proven, if any, would have resulted either in a judgment for the plaintiff, Corey Bros. Construction Company, or in favor of the Big Lost River Irrigation Company.

Off-set or recoupment claimed by the defendant is an affirmative defense, and the burden of proof is upon the party who makes such defense.

If the Big Lost River Irrigation Company had attempted to raise the defense in this action that it had been damaged by the failure and neglect of Corey Bros. Construction Company to properly perform its contract, and had asked for damages on account of such negligence and failure, that defense could have been made only by the Big Lost River Irrigation Company in a cross-bill, if such a defense could be made at all.

It is well established by decisions of the Federal

Court that the defendant cannot be granted affirmative relief unless by way of cross-bill.

Brande vs. Gilchrist, 18 Fed., 465;

Newton vs. Gage, 155 Fed., 608;

A Federal equity suit by Simkins, page 469
and cases cited.

Is it not incumbent upon the defendant trustees, if it seeks such an affirmative defense, to proceed in the same way?

If the Big Lost River Irrigation Company had raised such an issue as damages by a cross-bill, the lower court, at the request of plaintiff, would, in all probability, have submitted such an issue to the determination of a jury, and would have held the determination of the foreclosure of the mechanic's lien in abeyance until such issue of fact could have been tried by a jury.

It has been held a great many times that Federal equity courts do not look with favor upon set-offs, unless the set-offs arise out of the same contract between the same parties.

Dade vs. Irwin, 2 Howard, 283;

Farmers' Loan & Savings Co. v. Northern Pacific Realty Co., 58 Fed. 266.

The Big Lost River Irrigation Company has not defaulted in this action, and it has raised such issues by its answer as it thought best to put plaintiff upon the proof of its claim, and it has not raised the issue

that the work was done in a negligent or faulty manner; in fact, the testimony of Mr. C. B. Hurtt, president of the Big Lost River Irrigation Company shows that all the work done upon this project by Corey Bros. Construction Company was for the benefit of the Big Lost River Irrigation Company, and that neither he as president nor any director has ever made any claim that Corey Bros. Construction Company had not performed its contract in full as far as the work was done.

Corey Bros. Construction Company had no contract with the State of Idaho; its contract was with the Big Lost River Irrigation Company, and as far as Corey Bros. Construction Company and the Big Lost River Irrigation Company were concerned, those two companies could vary or modify their written contract at any time, and no one could find fault unless it be the State of Idaho, and the State of Idaho could find no fault with the Big Lost River Irrigation Company varying or modifying the performance of the contract with Corey Bros. Construction Company, unless such modification materially interfered with the contract between the State of Idaho and the Big Lost River Irrigation Company.

As we have heretofore said, the Big List River Irrigation Company is satisfied with the way Corey Bros. Construction Company did its work. This being so, the defendant trustees, in order to make a real

or fictitious issue, should have alleged and proven that the Big Lost River Irrigation Company has a good defense or off-set against part or all of the claim of Corey Bros. Construction Company, and that there was fraud or collusion between the officers of the Big Lost River Irrigation Company and Corey Bros. Construction Company for Corey Bros. Construction Company to obtain a larger judgment than it was legally entitled in equity and good conscience, and that on account of said fraud and collusion between said parties, and on account of said judgment being for a larger amount than was justly due, the defendant trustees' security was in danger of being partially or entirely destroyed. There is no such allegation in defendants' answer, and they have not introduced one scintilla of evidence showing that there is any such fraud or collusion. Without such allegations of fraud or collusion and without any evidence supporting it, it must necessarily follow as a corollary that if the Big Lost River Irrigation Company is satisfied with Corey Bros. Construction Company's work, that the defendant trustees must also be satisfied, willingly or unwillingly.

Mr. Phillips on Mechanics' Liens states the proposition as follows:

“It is too well settled to admit of dispute, that if full performance in minor particulars be dispensed with by the party to whom it is

due, this will not prevent the builder from filing his lien on the contract, as between lien creditors. In the absence of fraud, creditors have no right to rip up the settlement of the parties. If they could do that, they might invalidate the lien because the original contract was too liberal in price. Self-interest, in the absence of fraudulent motives, is regarded by the law as a sufficient guaranty that men will not pay, or agree to pay, more than they ought to pay when liquidating their transactions, or agree that contracts in their favor are complied with when they are not; and for this reason these contracts, be they settlements or otherwise, are allowed to stand when unimpeached in their honesty. It would lead to frightful litigation if creditors might attack all liens where complete performance was defective in some inferior particular, but which the parties, judging honestly for themselves, thought proper not to insist on. Such a principle, it is said, if carried to its legitimate results, would disturb half the judgments confessed on settlements throughout the country. and therefore, where a building erected under contract is substantially completed, full performance in minor particulars may be dispensed with by the party to whom it is due; and a mechanics' lien filed by the builders thereafter is valid against other lien creditors."

Phillips on Mechanics' Liens, 3rd Edition,
paragraph 254.

Counsel for appellants' trustees have cited a number of cases to overcome our objection that these defendants trustees are in no position to make the defense that they are trying to make. We have carefully examined each and all of these cases, and in our opinion they do not overcome our objection.

The case found in 113 Ga., is not in point, for the reason in that case the plaintiff, lienor, was trying to claim a lien upon property upon which he had made no improvements, and upon which the mortgagee held a mortgage. Such a defense is always open to a mortgagee.

There are other defenses open to a mortgagee, such as that the party who claims a lien has not complied with the statute in perfecting his lien; that the party did not commence his action within the period of the statute of limitations. All these and many other defenses are open to mortgagees to defend, but when it is admitted that the party who claims a lien has done work upon a piece of property and has not been paid for the same, and has complied with all the statutory requirements in filing his lien and in bringing his suit, it does not lie in the power of a mortgagee to say that the lienor has not fully complied with all the terms and conditions of the contract made with the owner, and this is especially so when the owner of the property says that he is satisfied with the work done by the mechanic or contractor.

In the case at bar we have Mr. C. B. Hurtt, president of the Big Lost River Irrigation Company, testifying that that company makes no objection to the manner and method that Corey Bros. Construction Company did its work, and that he, Hurtt, had a talk with the chief engineer in Chicago after the work had been stopped by the state on the Mackay dam, and that the chief engineer told him that Corey had complied with all the conditions and terms of his contract. It is true that the chief engineer contradicts this, but taking the circumstances under which this conversation took place, we believe that Mr. Hurtt is telling the truth, and while the chief engineer may not be intentionally telling a falsehood, he has forgotten.

Mr. Wayman also testified to conversations with Mr. Rosecrans, and Rosecrans stated to Wayman that Corey Bros. Construction Company had complied with all the terms and conditions of its contract.

We have no criticism to make of the authorities cited by appellants' counsel in relation to what the powers of an engineer or architect are under the facts in each of those cases cited, but counsel loses sight of one material fact in this case, and that is this: That the supervising engineers in this case were the agents, superintendents, representatives and vice principals of the Big Lost River Irrigation Company and had full power to represent their principal in the

interpretation of the plans and specifications, and in making alterations.

In this connection we wish to call the court's attention to the case of *Thomas vs. Stewart*, 132 N. Y., 580; 30 N. E., 577, in which Justice Vann says:

“But the appellant insists that the architect had no right to substitute an inferior article without the consent of the owner, and the authorities support that position. *Glacius v. Black*, 50 N. T., 145; *Bigler vs. Mayor*, 9 Hun. 253. The court, however, found upon evidence that is not printed in the case, but which it is expressly stipulated proved the fact, ‘that said Sahagian employed the said George Rayner as his architect and servant to superintend the work of erecting said house, and the doing of the work thereof, and the said Rayner did so superintend such work and the erection of such house.’ The contract provided that all work was to be done to the satisfaction of the architect, and the owner told one of the contractors that everything was left with the architect. Inasmuch as Mr. Rayner was not only the architect, but was also the agent of the owner, and represented him in the erection of the building, we think that he had authority to consent to the substitution complained of. The fact that the change was made without the knowledge or consent of the owner, as found by the court, evidently means, when the context is considered, without his personal knowledge or consent.”

See also *Solomon vs. Vallette*, 152 N. Y. 147;
46 N. E., 324;

Dunn vs. Steubing, 120 N. Y., 232; 24 N. E.
315;

Huber vs. St. Joseph Hospital, 11 Idaho, 631;
83 Pac. 768.

That the supervising engineer upon the ground was the agent, superintendent and vice principal of the Big Lost River Irrigation Company, it is only necessary to read the contract made between the Arnold Company and the Big Lost River Irrigation Company to arrive at this conclusion. In the forepart of this brief we have discussed a number of the terms of this contract.

We have made no claim and make no claim now that the certificates for work done issued to us by the engineers of the Big Lost River Irrigation Company are necessarily final or conclusive, but these certificates are *prima facie* evidence of the work done and the amount due, and unless the appellants' trustees have attacked these certificates as being wrong or were fraudulently issued or were issued under misapprehension of the facts then they are binding and conclusive.

Corey Bros. Construction Company in its bill of complaint alleged as follows:

“Your orator further shows unto this honorable court that 90% of the cost of the materials furnished and work done should be

paid to it by the defendant Big Lost River Irrigation Company, on or before the 10th day of each calendar month, for all work done during the preceding calendar month, and that said payments should be made on the estimates of the engineer of the amount of work done and material furnished." (Rec. 5.)

"Your orator further shows until this honorable court that in pursuance of said contract of employment, it performed the following work: (enumerating it). Making a total of work done and material furnished of \$1,215,015.14."

"Your orator further shows that all of said amounts are computed from the estimates made by the engineer in charge of said work." (Rec. 5, 6 and 7.)

Appellants' trustees in paragraph 4 of their answer referred to this allegation as follows:

"Further answering, these defendants say that they are not advised save by the allegations of said bill, as to what work, if any, has been done by the complainant upon account of the construction of any dam or canal for the Big Lost River Irrigation Company, nor as to what was the contract price or cash value of such work, if any, as has been done by said complainant; and these defendants pray that the said complainant may be required to make strict proof of each of the allegations of its bill of complaint in that behalf." (Rec. 50.)

This denial, if it is a good denial, put upon Corey Bros. Construction Company the burden of proving that such certificates were issued. The introduction of these certificates properly signed was *prima facie* evidence of the work done by Corey Bros. Construction Company upon this system, and these certificates issued by the agents and superintendents of the Big Lost River Irrigation Company to us are final and conclusive, unless the appellants' trustees have alleged something in their answer avoiding them, or have introduced proof to show that these certificates are wrong, and we respectfully submit to this honorable court that the appellants' trustees have not sought by any allegation in their answer or by any proof offered to impeach these certificates. That being so, they are final and conclusive.

On page 72 of appellants' brief counsel say:

"It is admitted by complainant that the Irrigation Company long before this suit was brought or this lien claim filed it parted with its entire interest in this property, to the extent that it had mortgaged the property for more than its value."

Where counsel can find any such admission in the record on our part, is more than we can comprehend. We will admit, for the purpose of this argument, that with the system uncompleted, that it was not worth the amount of the mortgages. The record

does not show that the Big Lost River Irrigation Company has parted with all of its interest in the property.

It is true that on August 27, 1909, the Big Lost River Irrigation Company made and executed a trust deed to the defendant trustees to secure a mortgage of \$2,000,000, and this trust deed was filed for record on the 3rd day of September, 1909.

We also admit that on January 1, 1910, the Big Lost River Irrigation Company made and executed its mortgage or trust deed to the appellants' trustees to secure bonds amounting to \$400,000, and that said trust deed was afterwards filed for record.

By the giving of these trust deeds the defendant Big Lost River Irrigation Company did not part with the title to said property. It simply gave a lien to the appellants' trustees upon whatever property was described in the trust deed.

Section 3381 of the Political and Civil Code of the State of Idaho reads as follows:

“Section 3381: Notwithstanding an agreement to the contrary a lien or a contract for a lien transfers no title to the property subject to the lien.”

Section 3388 reads as follows:

“Section 3388: Mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession.”

The Supreme Court of the State of Idaho in the case of Brown vs. Bryan et al, 6 Idaho, 1, 51 Pac. 995, has held a trust deed given to secure a debt is a mortgage, although it contains a power of sale.

In concluding this part of our argument we wish again to call attention to one provision of the contract made between Corey Bros. Construction Company and the Big Lost River Irrigation Company.

On page 486 of the Record under paragraph 5, we find the following:

“5. **Inspection.** The supervising engineer or his duly authorized assistants shall at all times have access to the work, which work is to be entirely under their control. Any material or construction which does not fully accord with the letter or the intent of these specifications may be condemned by the engineer or his representatives, and the contractor shall immediately rectify or replace such defective work without expense to the company.”

Under the head of “Guarantees,” on page 488, we find the following in this contract:

“The contractor further guarantees all workmanship and all material furnished by him to be first class in every particular, and agrees to replace, free of cost to the company, any part or piece showing defects of such material or workmanship within a period of one year from the completion of the entire work, unless otherwise specified.”

According to these two provisions it was incumbent upon the contractor Corey Bros. Construction Company to replace any workmanship that was inferior. The evidence shows conclusively and is uncontradicted that Corey Bros. Construction Company has never been asked to replace or rebuild any part of the work.

By the reading of this record it will be seen that there is a conflict of the evidence on questions of fact. This being so, it is a rule of this court and all federal appellate courts in general that unless manifest error has been committed by the lower court, the appellate court will not reverse findings of the lower court.

Provident L. & T. Co. vs. Camden & T. Co.,
177 Fed. 862;

Warren vs. Keep, 155 U. S. 265;

Wilcox vs. Consolidated Gas Co., 212 U. S. 19;

Topliff vs. Topliff, 145 U. S. 156;

Harding vs. Hart, 113 Fed. 304;

Oteri vs. Scalzo, 145 U. S., 578, 579, 590.

II.

Replying to Appellants' Contention that Corey Bros. Construction Company Made This Contract and Entered Upon This Work Without Complying With the Foreign Corporation Laws of the State of Idaho.

At the time Corey Bros. Construction Company commenced this work the Big Lost River Irrigation Company had not been organized. That corporation

was not organized until the 15th day of June, 1909. It had no meeting of its board of directors until the middle of July, 1909. (Rec. 575.) So it was impossible for Corey Bros. Construction Company to make a contract with a corporation before it was organized.

It is true that the officers of Corey Bros. Construction Company had a talk with the promoters of the Big Lost River Irrigation Company before said company was organized, and it is true that the promoters of the Big Lost River Irrigation Company furnished to Corey Bros. Construction Company a form of contract which would be executed as soon as the Big Lost River Irrigation Company was incorporated.

This contract was not executed until August 26, 1909, and Corey Bros. Construction Company had fully complied with the laws of the State of Idaho with reference to foreign corporations doing business on the 5th day of August, 1909. So that it will be seen that before this written contract was entered into Corey Bros. Construction Company had fully complied with the laws of the State of Idaho with reference to a foreign corporation doing business in that state.

The Big Lost River Irrigation Company did not obtain a title to this property until after the 16th day of July, 1909. (Rec. 582-586.)

On August 21, 1909, the Board of Directors of the Big Lost River Irrigation Company passed a resolution authorizing the officers of the company to enter into a contract with Corey Bros. Construction Company. (Rec. 588.)

This contract that was signed on August 26, 1909, does not attempt to ratify or speak of any work that had been done by Corey Bros. Construction Company, but our contention is that the Big Lost River Irrigation Company ratified all the acts of its promoters by accepting the work done by Corey Bros. Construction Company.

Whitney vs. Wyman, 101 U. S., 392;

Rogers vs. New York Etc., Land Co., 134 N. Y., 197, 211;

Wilson vs. Kings etc. R. R., 114 N. Y., 487;

Stanton vs. N. Y. etc. R. R., 22 Atl. Rep. (Conn.), 300;

Davis vs Montgomery etc. Co., 8 So. Rep. (Ala.), 496;

Pittsburgh etc Co. vs. Quintrell, 20 S. W. (Tenn.), 248;

Wood vs. Whalen, 93 Ill., 153;

Paxton vs. First Nat. Bk., 21 Neb., 621.

There can be no doubt but what the Big Lost River Irrigation Company after it was organized could have repudiated any verbal understanding that the promoters had with Corey Bros. Construction Company, but the evidence in this case shows that

after the Big Lost River Irrigation Company was properly organized and Corey Bros. Construction Company had complied with the laws of the State of Idaho relative to foreign corporations doing business in that state, these two companies then entered into a contract, and the Big Lost River Irrigation Company, by accepting the work done by Corey Bros. Construction Company before the Big Lost River Irrigation Company was organized, ratified all that its promoters did in its behalf.

The appellants' trustees in this case are also estopped from denying that Corey Bros. Construction Company has a lien upon the said property, for the uncontradicted evidence shows that this property, before Corey Bros. Construction Company did any work upon it, was practically valueless, and it is Corey Bros. Construction Company's work that has added value, if any value there is, to the property, which would be a benefit to the bondholders.

Bear Lake Irrigation Co. vs. Garland, 164
U. S., 1-20.

Again, the laws of the State of Idaho do not make any contract entered into with a foreign corporation within the State of Idaho void which has not complied with the statute by filing its articles.

Section 2792 of the State of Idaho in reference to foreign corporations reads as follows:

“No contract or agreement made in the name of, or for the use or benefit of, such corporation prior to the making of such filings as first herein provided, can be sued upon or enforced in any court of this state by such corporation.”

It has been held practically without contradiction, that a state statute which merely closes the courts of the state to a foreign corporation which has not complied with the condition of doing business within the state without expressly or constructively declaring the contract itself void, does not prevent the maintenance of an action in a federal court sitting in that state by such a foreign corporation, upon a contract within the state.

Barlin vs. Bank of British N. A., 50 Fed., 260;
 Sullivan vs. Beck, 76 Fed., 200;
 Blodgett vs. Lanyon Zinc. Co., 120 Fed., 893;
 Groton Bridge & Mfg. Co. vs. American Bridge
 Co., 151 Fed., 871;
 Dunlop vs. Mercer, 156 Fed., 545;
 Vitagraph Co. vs. Twentieth Century Opti-
 scope Co., 157 Fed., 699;
 Johnson vs. New York Breweries Co., 178
 David Lupton's Sons Co. vs. Automobile Club,
 Allen vs. Alleghany Co., 196 U. S., 458;
 Fed., 513;
 225 U. S., 489.

The case of Barling vs. Bank of British North America, *supra*, was a case decided by this Honorable

Court, and District Judge Deady speaking for the court said:

“The defendant Eva interposed a plea in abatement, to the effect that the plaintiff could not maintain the action, because it had failed to file the statements concerning its business, required by the California act of April 1, 1876, entitled ‘An act concerning corporations and persons engaged in the business of banking,’ which provides that no corporation or person ‘who shall fail to comply with the provisions of this law shall maintain or prosecute any action or proceeding in any of the courts of this state, to which plea the plaintiff demurred, and the court sustained the demurrer. 44 Fed. Rep. 641.

“In this there was no error. The statute only prohibits an action in the courts of the state. Neither does it prohibit the transaction of banking business in the state, but simply provides that the parties failing to file the required statement shall be denied access to the courts of the state. Nor is it in the power of the state legislature to prohibit the plaintiff from maintaining an action in this court if it would.

“While it is admitted that such legislature may limit the right or capacity of a foreign corporation to do business or acquire property within the limits of the state absolutely, or except upon compliance with conditions precedent thereto, it is well established that it cannot in any way limit or restrain the jurisdiction of the national courts. *Bank vs. Travel*, 7 Fed. Rep. 146; *Phelps vs. O’Brien Co.*, 2

Dill. 518; Railroad Co. vs. Whitton, 13 Wall. 270."

The case of David Lupton's Sons Co. vs. Automobile Club, *supra*, was a case where a corporation organized under the laws of the State of Pennsylvania sued to recover on a contract and for work done in the State of New York, said corporation not having complied with the state laws of New York, and the Supreme Court of the United States, speaking through Mr. Justice Hughes, said:

Under section 15 of the general corporation law of the State of New York a foreign stock corporation, other than a moneyed corporation, is prohibited from doing business in the state without having first procured from the secretary of state a certificate that it has complied with certain prescribed conditions. The corporation is required (section 16) to file with the secretary of state a sworn copy of its charter and a statement setting forth the business which it proposes to carry on in the state; to designate its principal place of business within the state, and to appoint a person upon whom legal process may be served.' Wood & Selick vs. Ball, 190 N. Y., 217, 224; 83 N. E. 21. Section 15 provides: 'No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless, prior to the making of such contract, it shall have procured such certificate.' In his original

report, the referee found that the Lupton Company was doing business in the state of New York, within the meaning of the statute, without a certificate of authority; and after the report was recommitted, he made additional findings with respect to the nature of its business, upon which the plaintiff in error bases its contention that the statute has been held to apply to transactions in interstate commerce which were not subject to the state's interdiction. It is not necessary, however, to review these findings, for the statute has received a construction by the highest court of the state of New York which precludes it, in any aspect of the case, from being regarded as a bar to the maintenance of this action.

“The referee's ruling that the contract was void was based upon the statement in the opinion in *Wood & Selick vs. Mall*, *supra*, that ‘the procuring of a license must precede the transaction of business, or the contracts of the corporation are not lawful.’ But in *Maher vs. Harrington Park Villa Sites*, 204 N. Y. 231,—L. R. A. (N. S.)——, 97 N. E. 587, the court of appeals of New York has declared that a contract made by a foreign corporation doing business within the state without certificate of authority is not absolutely void; that the only penalty prescribed by the general corporation law for a disregard of the provisions of section 15 is a disability to sue upon such a contract in the courts of New York; and that the contract remains valid and effective in all other respects.

In the Mahar case, the action was brought to recover a sum deposited under a contract made in New York with the defendant, a foreign corporation, which it was alleged was transacting business in the state without authority at the time the contract was made. It was asserted, in support of the action, that the contract was void, and hence that there was a failure of consideration. The court of appeals held that the complaint did not state a cause of action. In the opinion delivered by Willard Bartlett, J., in which the majority of the court concurred, it is said:

“ ‘It is assumed in the prevailing opinion’ (that is, the opinion below, 146 App. Div. 756, 131 N. Y. Supp. 514) ‘that this court held in the case of Wood & Selick vs. Ball, 190 N. Y. 217, 83 N. E. 21, that noncompliance with the requirements of that section has the effect of rendering any contracts made by such a corporation in this state absolutely void. Such is not my understanding of the purport of that decision. The only proposition decided in that case was ‘that compliance with section 15 of the general corporation law should be alleged and proved by a foreign corporation such as the plaintiff in order to establish a cause of action in the courts of this state.

* * * “The only penalty which the general corporation law itself prescribes for a disregard of the provisions of this section is a disability to sue upon such a contract in the

courts of New York. 'No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless, prior to the making of such contract, it shall have procured such certificate.' Consol. Laws, chap 23, sec. 15. This prohibition would be effective to prevent the appellant from suing the respondent upon the contract alleged in the complaint; but in my opinion it is not operative to wholly invalidate the contract. I think that the penalty imposed upon a foreign stock corporation for doing business in New York, without the certificate of authority required by section 15 of the general corporation law is limited to that prescribed in the section itself. No doubt the legislature could have gone further and declared all contracts to be void which were made by a foreign stock corporation doing business in this state without having obtained the certificate; but it has not done so. This was the view taken in *J. R. Asling Co. vs. New England Quartz & Spar. Co.*, 66 App. Div. 473, 72 N. Y. Supp. 347, affirmed in 174 N. Y. 536, 66 N. E. 1110, where it was held that section 15 did not prevent a foreign stock corporation doing business here without having procured the necessary certificate from recovering upon a counter-claim growing out of the transaction upon which the plaintiff sued. 'The defendant, having been brought into court, and thus made to defend,' said Mr. Justice O'Brien in that case, 'should be allowed,

unless there is a distinct provision to the contrary, not only to defend, but also to litigate, any question arising out of the transaction that has been made the basis of the plaintiff's complaint. There is no such prohibitive provision in this statute, and therefore the obtaining of the certificate would not be a prerequisite to a recovery upon the counter-claim in question.' (P. 476.) The Supreme Court of the United States has distinctly held that a contract made by a foreign corporation with a citizen of another state is not necessarily void because the corporation had not complied with the laws of such other state, imposing conditions upon it as a prerequisite to the lawful transaction of business therein."

By a reading of the decisions of the Supreme Court of the State of Idaho it will be seen that the court has held that contracts entered into by foreign corporations before such foreign corporation has complied with the statute in reference to doing business in that state are not void or invalid.

In the case of *Colby vs. Cleaver*, 169 Fed., 207, Judge Dietrich of the Federal Court of Idaho in speaking of this statute relating to foreign corporation doing business in that state before it had filed its articles of incorporation said:

"It is clear that the legislature did not intend that such contracts or agreements should be absolutely void; otherwise, they

would have placed them in the same category with conveyances of realty. That they are not void is the settled doctrine of the Supreme Court of the state. *Valley Lumber & Mfg. Co. vs. Nickerson et al.*, 13 Idaho, 682, 93 Pac. 24; *Valley Lumber & Mfg. Co. vs. Driessel*, 13 Idaho, 662, 93 Pac., 765, 15 L. R. A. (N. S.) 299. Moreover, it is equally clear that it was not the intention of the legislature to declare them unenforceable against the corporation. The real question is whether such a contract is ever or at all enforceable by or upon behalf of such corporation. The Supreme Court of the state has, in effect, held that it is not a lifeless thing, that the provisions thereof in favor of the corporation are not void, but that, when such contract is sued upon in a state court by the corporation, it shall be just as available to the corporation as it would be had the corporation not been in default at the time of the execution of the contract, unless the defendant, seasonably and in an appropriate manner, makes objection upon the statutory ground. See *Valley Lumber & Mfg. Co. vs. Nickerson* and *Valley Lumber & Mfg. Co. vs. Driessel* cited *supra*.

“If this view be correct, then such a contract or agreement is a subsisting and binding obligation, not only of the corporation, but of both parties thereto: for, if the undertaking of the one part were lifeless, his failure to raise objection could not operate to breathe life into that which was never animate. The point of

pleading and practice thus settled in the state courts is not in question here, for the defendant has raised timely objection; but I have directed attention to this view of the Idaho court for the purpose of more clearly fixing and defining the status of such a contract. If the legislature had declared such contract, or the portions thereof in favor of the defaulting corporation, to be void, or if it were provided that such contract is not enforceable by or on behalf of such corporation or its assignee, there would be no room for doubt as to the legislative intent; but the provision is that such a contract cannot be enforced in any court of this state.' In interpreting a statute, it is generally the duty of the court to give each of its several clauses and phrases some meaning. The exceptions to the rule are rare. The phrase 'of this state' does not inject into the enactment either conflict or ambiguity; nor, if retained, is it materially at variance with the remedial purpose of the legislation, and I am unable to discern any valid reason for rejecting it. What significance did the legislature attach to it? If it is to be given any meaning at all, it must be one of limitation. If it was the intention of legislature to provide that such a contract should not be enforceable in any court, why was not the phrase 'of this state' omitted? Apt phraseology to express the idea of absolute nonenforceability readily suggests itself, and it is impossible to avoid the conclusion that it was not the intention to de-

clare such a contract wholly unenforceable, but only to deny to the delinquent corporation certain means of enforcement. In other words, the state legislature intended that the doors of the state tribunals should be closed against a foreign corporation which had transacted business in the state in violation of the state laws. If this view be correct, the clause does not, by its terms, embrace federal courts."

In the case at bar the record shows that as soon as Corey Bros. Construction Company had a verbal understanding with the promoters of the Big Lost River Irrigation Company about doing this work on the canal system that it immediately proceeded to file its articles with the County Recorder of Custer County, and did file such articles in July, 1909, and on August 5, 1909, filed another certified copy of its articles from the recorder of Custer County with the Secretary of State, and on said day the Secretary of State issued to Corey Bros. Construction Company a certificate stating that Corey Bros. Construction Company was authorized to do business in the State of Idaho, and that it had complied with the laws and constitution of the State of Idaho relative to foreign corporations doing business in that state. So that before any legal contract was entered into between Corey Bros. Construction Company and the Big Lost River Irrigation Company, Corey Bros. Construc-

tion Company had fully complied with the law relating to foreign corporations.

The rule invoked by appellants' counsel is a very harsh and unnatural construction to give to the Idaho statute, and we believe that a careful perusal of the decisions of the Supreme Court of the State of Idaho will show that the court has never intended to declare all contracts made by foreign corporations before said corporations have complied with the law to be void or invalid.

III.

Replying to Appellants' Brief That District Court was Without Jurisdiction.

Corey Bros. Construction Company, a corporation of Utah, and a resident and citizen of Utah, filed its bill to foreclose its mechanic's lien in the Circuit Court of the United States for the District of Idaho at Boise on the 15th day of October, 1910, and made as parties defendant the Big Lost River Irrigation Co., a corporation of Idaho, and a resident and citizen of Idaho, and the American Trust & Savings Bank (now the Continental and Commercial Trust and Savings Bank), a corporation of Illinois, and a resident and citizen of Illinois, and Frank H. Jones, a resident and citizen of Illinois, parties defendant. The amount sought to be recovered was over \$500,-

000, and the property sought to be foreclosed under the mechanic's lien was in the State of Idaho. These allegations show the requisite citizenship and the amount involved to be sufficient to give the United States Circuit Court jurisdiction.

On the 22nd day of October, 1910, the Union Portland Cement Company, a corporation of Utah, and a resident and citizen of Utah, commenced a separate action in the same court and against the same parties defendant to foreclose its mechanic's lien for the sum of about \$14,000.

On the 27th day of November, 1910, Corey Bros. Construction Company filed an amended bill making new parties defendant, and among these new parties defendant was included the Union Portland Cement Company, a resident and citizen of Utah, and other parties who were residents of Utah and Idaho.

On the 21st day of January, 1911, before any of the parties defendant had plead to Corey Bros. amended bill, on motion of the solicitor for Corey Bros. Construction Company the Union Portland Cement Company and all the other parties defendant who were residents of Utah were dismissed.

On the 29th day of May, 1911, on motion of Corey Bros. Construction Company and on notice to all the parties defendant, the judge of the District Court appointed a receiver of all the property of the Big Lost River Irrigation Company. Said receiver qualified

and took possession of all of said property, and is now in possession of all of the property. Appellants' trustees and the Big Lost River Irrigation Company consented to the appointment of this receiver.

After this property was in custodia legis, the Union Portland Cement Company intervened in the Corey Bros. Construction Company case to foreclose its mechanic's lien. Answers were filed by all of the defendants and the issues were made up. Evidence was taken and the lower court entered judgment in favor of Corey Bros. Construction Company and Union Portland Cement Company against the Big Lost River Irrigation Company and declared said judgments to be a prior claim over the mortgage of the appellants' trustees and over the claims of the other defendants.

No special plea was interposed by the appellants' trustees in the lower court that there were other, necessary or indispensable parties who should be made either plaintiffs or defendants in said action.

Appellants then were well acquainted with the facts when they filed their answer as they were later on in the case.

Counsel for appellants have sought to give a forced, unnatural and strained construction to one of the provisions of the Idaho statute relating to mechanic's liens, and unless this section of the statute upholds their claim, they must fail in their conten-

tion that the lower court had no jurisdiction.

Section 5120 of the Civil Code of Procedure of the State of Idaho reads as follows:

“Section 5120. In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien or class of liens which shall be in the following order.” (Setting out priorities.)

That is to say, that when there are several parties plaintiff and defendant who are asserting different liens to the same property in the same suit, then the court in rendering judgment must declare priorities of said liens as pointed out by the statute. These priorities can only be determined by the parties **who are asserting** their liens, either by way of complaint, cross-complaint or counter-claim. There might be a party defendant who had a lien, yet if he did not assert it then, it would not be incumbent upon the court to determine his priority, if he had any.

There is nothing in the code or statutes of Idaho that says that a lien claimant cannot sue the original owner without joining all others who may have liens or claims against the property involved. In fact the statute of Idaho expressly declares to the contrary.

Section 5121 of the Civil Code of Procedure of Idaho reads as follows:

“Section 5121. Any number of persons

claiming liens against the same property may join in the same action, and when separate actions are commenced the court may consolidate them. The court shall also allow as part of the costs the moneys paid for filing and recording the claim, and reasonable attorneys' fees."

Under the foregoing statute any number of lien claimants may join as plaintiffs or any one may sue the owner and assert his claim, and if they are different suits, the court may consolidate them or he may not consolidate them.

It has always been a rule of procedure for a court of equity in its judgment to determine the priorities of conflicting claimants, and courts of equity, when it can be done, will consolidate different causes of action that affect the same property, and will render a decree that will do justice to all the parties as their claims may appear before it.

What have been rules of equity for courts to follow, Idaho has simply by the two foregoing provisions enacted into a statute. Federal courts sitting in equity have been governed by these rules.

It has also been the rule of federal courts sitting in equity, upon a proper application of either plaintiff or defendant, to make other parties defendant, if it can be done without ousting the court of its jurisdiction to hear and determine the case. Federal courts

will not make proper or necessary parties defendants unless they are indispensable, when such joinder will oust the court of jurisdiction. If the court finds that a party is an indispensable one and by joining such party as defendant would oust the court of jurisdiction, then the court will dismiss the whole action. So the question reverts back to the proposition whether the Union Portland Cement Company was an indispensable party.

Corey Bros. Construction Company had no claim against the Union Portland Cement Company. Its claim was against the Big Lost River Irrigation Company, and to secure that claim it filed its mechanic's lien, and it could sue the Big Lost River Irrigation Company to enforce that mechanic's lien without joining any of the other parties as defendant, and if it should obtain judgment against the Big Lost River Irrigation Company, it could sell out all the interests of the Big Lost River Irrigation Company, but the other lien claimants who were not made parties would not be affected by that decree.

It has been the practice in federal courts and in state courts all over the United States for one mortgagee to commence an action against the mortgagor to foreclose his mortgage, and it is not necessary to make prior or subsequent mortgagees parties defendant, and it has been the rule in federal courts and in state courts for a lien claimant to sue the owner and

not join with any other lien claimant. The joining of other lien claimants is only for the purpose of quieting title, and it is always at the option of the plaintiff whether he will join or not join as party defendants other claimants.

It is our contention that the appellants' trustee having not raised by special plea that the Union Portland Cement Company was a necessary party, that this court and the lower court are bound by the allegations of plaintiffs' complaint, and this complaint showing the requisite diversity of citizenship, that the lower court had jurisdiction, unless the court should be of the opinion that the Union Portland Cement Company was an indispensable party.

In the case of Butchers' & Drovers' Stockyards Co. vs. Louisville & N. R. Co., 67 Fed., 40, Judge Taft says:

“We think a liberal construction of the bill must be given to sustain the jurisdiction of the court at this time, in view of the fact that no plea to the jurisdiction was made below, and no question of the jurisdiction seems there to have been raised. But it is said that the averment to be jurisdictional amount is denied by the answer, and is not sustained by any proof. It was decided in *Wickliffe vs. Owens*, 17 How 17, that where a bill in chancery avers that the defendant is a citizen of another state, this averment can only be impugned in a special plea to the jurisdiction of the court, and

that the answer is not a proper place for it, under the thirty-third equity rule governing the practice in the federal courts. By pleading to the merits, the defendant admits the averments in the bill which state facts sufficient to establish the jurisdiction of the court. *Sheppard vs. Graves*, 14 How. 505; *De Sobry vs. Nicholson*, 3 Wall. 420. The objection to the jurisdiction of the circuit court, therefore, is not sustained."

In the case of *Crown Cork & Seal Co. vs. Standard Brewery*, 174 Fed., 253, Judge Sanborn said:

"Complainant is alleged to be a Maryland corporation, and a citizen of that state, and defendants citizens of Illinois, and residents of the district where suit was brought, and the matter in dispute is averred to be \$50,000 in each case. The citizenship of defendants and amount in dispute are admitted by failure to deny, but the answers deny the citizenship of complainant. However, there was no plea to the jurisdiction, so that in equity it stands admitted, whatever the rule may be at law. *Butchers' & Drovers' Stockyards Co. vs. Louisville & Nashville, R. Co.*, 67 Fed. 35, 14 C. C. A. 290, 31 U. S. App. 252; *Roberts vs. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579.

Counsel for appellants in their brief at page 109 have quoted quite extensively from the case of *Gray*

vs. Havemeyer, 53 Fed., 174. That was a case of a foreclosure of a mortgage in which other mortgagees and various lien claimants were made parties defendant. The lower court entered a decree that the mortgages were prior liens over the lien holders, except as to one lien holder, who was entitled to \$12.00 preference. One of the lien holders defendant appealed from this judgment and failed to cite all the other lien holders into the appellate court, and the appellate court said that it could not disturb the judgment, for the reason that all the parties interested in the judgment were not before that court.

That is the general rule of all appellate federal courts, that where the judgment is joint or several, in order to review the judgment as between all the parties, all the parties must be cited into the appellate court, and if the judgment is joint and relates to real estate, that a failure to cite said parties will be a cause for dismissal of the case.

The case of Gray vs. Havemeyer was decided by the Eighth Circuit Court of Appeals.

In the case of Faulkner vs. Hutchins, 226 Fed., 362, the court cites the case of Gray vs. Havemeyer, and in its percuriam opinion says:

“The decree in this case was against R. B. Faulkner, Fayette Owens, Jim Bends, Minnie Owens, and John Crisp for possession of real estate and against R. B. Faulkner, George W.

Holder, M. W. Riley, M. L. Powers, J. T. Jack, and John Draughon for \$560. The appeal was taken by R. B. Faulkner alone from this joint decree, and there is no evidence in the record of any summons and severance or of any notice to the other defendants to participate in the appeal. A separate appeal by a single party from a joint decree against him and others cannot be maintained without notice to the other defendants. For this reason the decree of the Court of Appeals of the Indian Territory, which dismissed the appeal was right, and it is affirmed. *Masterson vs. Herndon*, 10 Wall, 416, 19 L. Ed. 953; *Hardee vs. Wilson*, 146 U. S. 179, 181, 13 Sup. Ct. 39, 36 L. Ed. 933; *Davis vs. Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563; *Gray vs. Havemeyer*, 3 C. C. A. 497, 505, 53 Fed. 174, 178; *Farmers' Loan & Trust Co. vs. McClure*, 78 Fed. 211, 212, 24 C. C. A. 66, 67; *Dodson vs. Fletcher*, 78 Fed. 214, 215, 24 C. C. A. 69, 70.

In the case of *Lewis vs. Sittel*, 165 Fed., 157, Judge Sanborn again refers to the case of *Gray vs. Havemeyer*.

In this case Judge Sanborn holds that it cannot review the judgment of the lower court in order to reverse it, for the reason that all the necessary parties who were defendants in the lower court had not been cited, and for this reason affirms the judgment of the lower court.

On the question of indispensable parties, the jurisdiction of the Federal Court, rearrangement of parties plaintiff and defendant in the Federal Court and other questions pertinent to the questions already argued, we cite the court to the following cases:

- Shulthis vs. McDougal, 225 U. S., 561;
- Helm vs. Zarecor, 222 U. S., 32;
- Shields vs. Barrow, 17 How. (58 U. S.) 130;
- Armstrong Cork Co. vs. Merchants' Refrigerating Co., 184 Fed., 199;
- Pacific R. R. vs. Ketchum, 101 U. S. 298;
- Compton vs. Jessop, 68 Fed., 279;
- Wolterman vs. Canal-Louisiana Bank, 215 U. S., 33;
- Wabash Railroad vs. Adelbert College, 208 U. S., 54;
- Heidritter vs. Oil Cloth Co., 112 U. S., 294;
- Newton vs. Gage, 155 Fed., 604;
- People's Sav. Inst. vs. Miles, 76 Fed., 252;
- National Bank vs. Allen, 90 Fed., 545;
- Simpson, Federal Equity Suit, pages 494 to 495;
- Farmers' Loan & Trust Co. vs. Lake Street Ry. Co., 177 U. S., 51;
- 182 U. S., 417;
- Morgan vs. Texas Ry. Co., 137 U. S., 201.

The petition in intervention of the Union Portland Cement Company stated that there was no controversy existing between it and Corey Bros. Construction Co. Counsel for Corey Bros. Construction

Company and Union Portland Cement Company stated in open court that there was no controversy existing between these two parties, and that neither one claimed preference over the other, and counsel now makes that same statement to this court.

IV.

Replying to Appellants' Brief that Corey Bros. Construction Company is Estopped to Assert a Lien Superior to That of the Trust Deed.

W. W. Corey, president and general manager of Corey Bros. Construction Company, testified that he did not know that there was any trust deed or any bonds issued under a trust deed until March, 1910. George S. Speer contradicts Mr. Corey.

Mr. Speer further testified that he first met Corey in Denver while Corey was over there bidding on a project, which was in the spring of 1909. Corey denies that he was in Denver bidding on a proposition in the year 1909, but that he did bid on some work in 1910. Corey's testimony in this respect is corroborated by plaintiffs' Exhibit No. 94, which is a letter from Trowbridge & Niver signed by George S. Speer as vice president, and which letter is dated March 12, 1910. In this letter Mr. Speer informs Mr. Corey that there was another bidder cheaper than Corey's bid for the work to be done. (Rec. 554.)

There is no contention made that Corey Bros. Construction Company agreed not to claim a lien or file a lien or that its claim would be waived in favor of any subsequent mortgage, and there is not one scintilla of evidence that Corey Bros. Construction Company or any of its officers ever induced any person to buy a bond that was issued upon this project, and there is no evidence in the record whatever that there is an innocent purchaser of these bonds. Probably counsel for appellants, when they were speaking about innocent purchasers, referred to Trowbridge & Niver and George S. Speer, for it appears in this record that these parties have converted 200,000 of these bonds to their own use. (Rec. 355.)

Section 5114 of the Statute of Idaho reads as follows:

“Section 5114: The liens provided for in this chapter are preferred to any lien, mortgage or other incumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance, of which the lien holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished.”

The first part of this statute provides that “me-

chanic's liens are preferred to any lien, mortgage or other incumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced."

Corey Bros. Construction Company's contract was signed on August 26, 1909. It had already commenced work under its contract, and defendants' trustees' first mortgage was not acknowledged until August 27, 1909, and was not filed for record until September 3, 1909, so according to the express terms of this statute Corey Bros. Construction Company's mechanic's lien is superior to defendants' trustees' several trust deeds, for the reason that these trust deeds were not made or filed for record until after Corey Bros. Construction Company's contract was signed and Corey Bros. Construction Company had actually commenced work. Our contention is that Corey Bros. Construction Company's lien would attach even if Corey Bros. Construction Company knew that it was the intention of the Big Lost River Irrigation Company to subsequently mortgage this property, upon the principle "he who is prior in time is stronger in right."

Where the statute expressly states who shall be prior in time, a court of equity can not change this rule, notwithstanding a hardship may be worked upon some party, unless fraud is involved and there is no intimation in this record that Corey Bros. were

guilty of any deception or fraud of any kind.

We were working upon this project when this mortgage was made and executed, which was notice to the trustees and the bondholders that the party who was doing this work might claim a lien for that work.

Garland vs. Bear Lake & Irrigation Co., 164 U. S., 1-20.

Bloom on Mechanics' Lien, Par. 487.

Mine & Smelter Supply Co. vs. Idaho Consolidated Mines Co. (Idaho), 118 Pac. Rep. 301.

Iowa Mortgage Co. vs. Shanquest, 70 Iowa, 124.

Germania B. & L. Association vs. Wagner, 61 Cal., 349.

In the case of Garland vs. Bear Lake & Irrigation Company the Supreme Court held that a contractor who went upon the public lands and constructed a ditch had a lien for work done prior to a mortgage that was already of record when the work was commenced.

V.

Replying to Plaintiffs' Brief That Irrigation Works Constructed Under the Carey Acts Are Not Subject to a Mechanic's Lien.

The Supreme Court of the State of Idaho has

held that a mechanic's lien does attach to a project of this kind. That decision was rendered on January 4, 1908.

There have been three sessions of the legislature of the state of Idaho since that decision was rendered by the Supreme Court, and not one of these legislatures has seen fit to change this rule of law as announced by the Supreme Court.

Nelson Bennett Co. et al vs. Twin Falls Land & Water Co., 14 Idaho, 5; 93 Pac., 789.

In 1912 the Supreme Court of Idaho again rendered another decision affirming this same proposition.

Hill vs. Twin Falls & Salmon R. L. & W. Co., 125 Pac., 204.

The construction of this statute by the Supreme Court of Idaho is binding upon this court.

Martin vs. West, 222 U. S., 191.

Mathias Schmidinger vs. City of Chicago, decided by the Supreme Court of the United States on January 13, 1913, 33 Sup. Ct. Rep. 182.

For other authorities upon mechanics' liens see:

Brooks vs. Railway Co., 101 U. S., 443.

Meyer vs. Hornby, 101 U. S., 730.

Ban vs. Columbia Southern R. R. Co., 117 Fed., 25.

The case of Meyer vs. Hornby, *supra*, is a good case on the question of estoppel, one of the questions raised by appellants' brief.

The case of Ban vs. Columbia Southern Railway Company, *supra*, is a case decided by this court in which Judge Hawley wrote the opinion. This case is instructive on a number of the errors relied upon by appellants in their brief.

At this time we wish again to call the attention of this court to the fact that the appellants' trustees did not ask for any affirmative relief in the court below. They have filed no cross-bill, and therefore a great many questions that they ask this court to decide are not in issue.

The court below did not give us any lien upon the settlers' contracts, and if it had attempted to render any decisions concerning these settlers' contracts, it would have been a mooted question for the court to decide.

If counsel had wished these questions to have been decided, it should have raised that issue by a cross-complaint.

Affirmative relief in an answer must be set up in a cross-bill.

Hill vs. Ryan Grocery Co., 78 Fed., 21.

Chapin vs. Walker, 175 Fed., 6.

The making of the Lost River Water Company

a party to this suit cannot be raised at this time, for the reason that no plea of necessary parties has been filed raising this question.

The Lost River Water Company is an Idaho corporation and by making that company a party defendant would not have ousted the Federal Court of jurisdiction.

VI.

Replying to Appellants' Contention That Under the Laws of Idaho Irrigation Companies May Sell Water Rights Free and Clear of Existing Incumbrances on the System.

If that proposition is true the purchasers of water contracts have not been injured. Neither have appellants' trustees.

VII.

Replying to Appellants' Contention That the Contract Between the State of Idaho and the Big Lost River Irrigation Company Dated May 27, 1909, is Not Assignable Without the Consent of the State.

This question is not raised by the pleadings, and is not properly before this court for decision.

The state of Idaho is not a party to this suit and will not be injured by any decree that the court has entered.

Query: What would the appellants' trustees contend if they were foreclosing their trust deeds?

VIII.

Replying to Appellants' Contention that the Irrigation System Cannot Be Sold Without the Right of Redemption.

At first blush it would seem that the lower court in decreeing that the property of the Big Lost River Irrigation Company should be sold as a whole and without the right of redemption was error.

This contract that the Big Lost River Irrigation Company had with the state of Idaho is in the nature of a franchise, a right or privilege to enter upon public lands to construct a reservoir and canal system, and to irrigate about 100,000 acres of land. The reservoir and the canals and the water should be considered as an integer; that is to say, the taking away of any one part makes the whole valueless.

The only real estate described in this decree is found on page 667 of the record. All of this real estate, when the reservoir is completed and filled with water, would be covered over with water. Testimony of Goyne Drummond, page 184. This also appears from the affirmative allegations in appellants' answer, found on page 52 of the Record. So that the use of this real estate is of the same kind and nature as the real estate upon which the canals are located;

the only difference being the canals are used as conduits for the conveyance of water and the reservoir is used as a receptacle for the holding of water.

This contract should have been completed on or before April 30, 1912. (Rec. 477.)

On account of the insolvency of the Big Lost River Irrigation Company and the subsequent litigation involving this property, nothing has been done with it, and it remains in the same condition as it did when Corey Bros. Construction Company stopped work.

It would be absolutely impossible to sell this system in parts, and it is very doubtful if the system would bring very much under a foreclosure sale if the right of redemption should be allowed.

The lower court has rendered no opinion upon this question. This question was discussed before the lower court after he had rendered his opinion, and his opinion in respect to this phase of the case was orally rendered, and that is the reason why it does not appear in this record.

Counsel for appellants resisted vigorously this part of the decree, but the court was of the opinion upon the authorities cited by appellees' counsel that the interest of all parties and the public would be best subserved in selling this property to cut off the equity of redemption.

Hammock vs. Loan & Trust Co., 105 U. S., 77;

- Farmers' Loan & Trust Company vs. Iowa Water Co., 78 Fed., 881;
 Pacific Northwestern Packing Co. vs. Allen, 116 Fed., 312;
 Central Trust Co. vs. Sheffield, etc., Ry., 60 Fed., 17;
 Columbia Finance & Trust Co. vs. Kentucky Union Ry., 60 Fed., 799;
 American Loan & Trust Co. vs. Union Depot Co., 80 Fed., 40;
 Sioux City Terminal R. & Co. vs. Trust Co., 82 Fed., 137;
 National Foundry Co. vs. Oconto Water Co., 52 Fed., 45-59; which was affirmed by the Circuit Court of Appeals in 59 Fed., 20;
 McKensie vs. Water Co., 6 N. D., 380; 71 N. W., 614;
 Ten Eyck vs. Pontiac, 114 Mich., 500; 72 N. W., 364;
 McFadden vs. Mays Landing R. R., 49 N. J. Equity 191; 22 At. 937;
 Seibert vs. Minneapolis, etc., Ry., 58 Minn., 67; 59 N. W., 827.

The case of National Foundry & Pipe Works vs. Oconto Water Company, 52 Fed. 43, was decided by District Judge Jenkins. This opinion was affirmed by the 7th Circuit Court of Appeals in a per curiam opinion, and the judges said: "We concur in the opinion and conclusion of the Circuit Court as reported in 52 Fed., 43. The decree below is therefore affirmed."

We desire to call the court's special attention to this opinion of Judge Jenkins, for the reason that it relates to mechanics' liens, statutory construction and what property is subject to mechanics' liens.

IX.

HAS THIS COURT JURISDICTION TO HEAR AND DETERMINE THIS CASE UPON ITS MERITS OR TO REVERSE THE SAME AS BETWEEN COREY BROS. CONSTRUCTION COMPANY AND UNION PORTLAND CEMENT COMPANY AND THE BIG LOST RIVER IRRIGATION COMPANY, THOUGH MANIFEST ERROR HAS BEEN COMMITTED?

Though we have argued this case somewhat at length on behalf of the appellees, Corey Bros. Construction Company and Union Portland Cement Company, yet we do not intend by this argument to waive the question that this court has no jurisdiction to hear or determine this case or to reverse the judgment and decree in behalf of Corey Bros. Construction Company and Union Portland Cement Company against the Big Lost River Irrigation Company, for the reason that neither the Big Lost River Irrigation Company or the other defendants named in said decree, except the Continental and Commercial Trust

and Savings Bank, a corporation, and Frank H. Jones, are before this court.

On the 27th day of December, 1912, the lower court entered judgment and final decree in behalf of Corey Bros. Construction Company and the Union Portland Cement Company, intervenor, and against the Big Lost River Irrigation Company, the Continental and Commercial Trust and Savings Bank, a corporation (formerly the American Trust and Savings Bank, a corporation), Nephi Hansen and others as defendants. (Record pages 665 to 679.) This decree was in favor of Corey Bros. Construction Company in the sum of \$625,444.03, and also in favor of the Union Portland Cement Company in the sum of \$17,054.40 and \$500.00 costs against the Big Lost River Irrigation Company, and adjudged said sums to be a lien upon said property described in said decree, and that said sums of money were superior to the mortgage liens of the Continental and Commercial Trust and Savings Bank, a corporation, and Frank H. Jones, as Trustees, and any other liens that the balance of the defendants might have who are named in said decree. (Rec. 665.)

On March 26, 1913, the defendants, the Continental and Commercial Trust and Savings Bank, a corporation, and Frank H. Jones, trustees, filed their petition for appeal, which appeal on the same day

was allowed by the judge of the lower court. (Rec. pages 679-680.)

On the same day the Continental and Commercial Trust and Savings Bank, a corporation, and Frank H. Jones filed and served their assignments of error upon counsel for Corey Bros. Construction Company and the Union Portland Cement Company. (Rec. pages 681 to 690.)

On the same day said trustees as appellants gave a written undertaking to Corey Bros. Construction Company and the Union Portland Cement Company for \$500.00, which undertaking was approved and filed on March 26, 1913. (Rec. pages 690 to 692.)

On said March 26, 1913, the court issued a citation directed to Corey Bros. Construction Company and the Union Portland Cement Company, which citation was served on the same day on counsel for Corey Bros. Construction Company and Union Portland Cement Company.

So it appears from the record in this court that the only parties who are properly before this court are the Continental and Commercial Trust and Savings Bank and Frank H. Jones as appellants and Corey Bros. Construction Company and Union Portland Cement Company as appellees. The Big Lost River Irrigation Company, the principal defendant, and James E. Clinton, Receiver of said company, and the other defendants are not before this court.

This case was tried at Boise City in the state of Idaho and was commenced and tried in what is known as the Central Division for hearing and trying the cases in the United States Court in and for the state of Idaho. This central division has two terms of the United States District Court, one commencing on the second Monday in March and the other on the second Monday in September of each year.

So that it affirmatively appears from the record that is on file in this court that the appeal in this case was not taken in open court; neither was it taken at the same term of court in which the decree was rendered.

This record further shows that there was no notice given or served by the appellants upon the other defendants and their refusal to join in this appeal. Neither does the record show that there has been any severance. This being so, the Big Lost River Irrigation Company and the receiver of said company and the other defendants are not before this court for any purpose, either as appellants or as appellees. For this reason this court would have no jurisdiction to reverse this decree as it stands between Corey Bros. Construction Company and Union Portland Cement Company, and the Big Lost River Irrigation Company and the other defendants.

The Supreme Court of the United States In Re

Metropolitan Trust Co., 218 U. S. Report, page 320, speaking through Justice Hughes, said:

“The decision of the Circuit Court of Appeals, in reversing the final decree and in directing the remand to the state court, was, of course, subject to the necessary limitation that it could apply only to the parties who had been brought before that court. It had no other purport. It is one of ‘the ordinary rules respecting appeals’ that ‘all the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal.’ *Davis vs. Mercantile Trust Co.*, 152 U. S. 590, 593. See also *Terry vs. Abraham*, 93 U. S. 38; *Wilson vs. Kiesel*, 164 U. S. 248, 251. If a party has not had this opportunity he is not bound; as to him an essential element of appellate jurisdiction is lacking. Accordingly, when the decree was entered in the court below upon the mandate of the Circuit Court of Appeals, the Trust Company was expressly excepted from its operation.”

Again this court has no right to hear or determine this case upon its merits, but should dismiss the appeal.

The testimony in this case is a joint decree as against the defendants. It orders a certain amount of money to be paid, and in the event that said money is not paid, that certain property in which all the de-

fendants claim some interest be sold out to satisfy said judgment, and it specially forecloses out whatever interest the Big Lost River Irrigation Company or the Continental and Commercial Trust and Savings Bank and Frank H. Jones, trustees, or the other defendants may have in and to said property.

This court in the case of Puget Sound Navigation Co. vs. Lavendar et al., 156 Fed., 361, speaking through Justice Gilbert, said:

“This court is bound to inquire, first, as to its own jurisdiction, and, second, as to the jurisdiction of the court from which the record comes, and this even when the question is not raised by the parties to the action. *M. C. & L. M. Ry. Co. vs. Swan*, 111 U. S., 379.”

Again this court in *Copland et al vs. Waldron*, 133 Fed., 217, speaking through Justice Hawley, said:

“Appellants admit that the decree appealed from is joint, and that a joint decree should be appealed from by all, or severance made; that the fact that Pirie did not appear in the lower court furnishes no excuse for appellants leaving him out on the appeal; and that this court has the power to dismiss the appeal for want of his presence. But appellants claim that the contention of appellee that this court has no power to bring the omitted party in is not correct.

We are of opinion that the facts of this

case bring it within the rule announced by the Supreme Court in *Estis vs. Trabue*, 128 U. S. 225, 229, 9 Sup. Ct. 58, 32 L. Ed. 437. After holding that a writ of error, in which the plaintiff and defendants were designated merely by the name of a firm containing the expression ‘& Co.,’ was not sufficient to give the court jurisdiction, but, inasmuch as the record disclosed the names of the persons composing the firm, allowed the writ to be amended, under section 1005 of the Revised Statutes (U. S. Comp. St. 1901, p. 714), the court said:

“But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under section 1005. The judgment is distinctly one against the claimants, and C. F. Robinson and John W. Dillard, their sureties in their ‘forthcoming bond,’ jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties or as containing a judgment against the sureties, payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. * * * It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ, or else there must be a proper summons and severance, in order to allow of the prosecution of the writ

by any less than the whole number of the defendants against whom the judgment is entered. * * * Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case. * * * It will then, of its own motion, dismiss the case, without awaiting the action of a party."

This court in the case of *Farmers' Loan & Trust Co. vs. Longworth*, 76 Fed., Rep., 609, speaking through Circuit Court Justice Gilbert, said:

"In a suit pending in the Circuit Court for the district of Washington, in which the Farmers' Loan & Trust Company, as complainant, sought to foreclose its mortgage against the Northern Pacific Railroad Company and other defendants, Henry Ives, Henry Rouse and H. C. Payne were appointed receivers of the railroad company, and thereafter Andrew F. Burleigh was substituted as sole receiver, in their stead. During said receivership the appellees in this case, Longworth, Bellinger, and Raskey and wife, obtained three several judgments against the Northern Pacific Railroad Company on liabilities incurred by the company before the foreclosure suit was commenced. On the 11th day of August, 1894, they intervened in the foreclosure suit, and united in a petition to the court for an order requiring the receiver to pay them their respective judgments. Upon this intervention the Farmers' Loan & Trust Company answered the petition,

setting forth its mortgage liens upon the property of the Northern Pacific Railroad Company; alleging that the judgments against the railroad company in favor of the petitioners were obtained upon liabilities that attached subsequently to the date of the mortgage liens, and that from and after August 1, 1893, the Northern Pacific Railroad Company had been insolvent, and that its property in the hands of the receiver was inadequate to pay the mortgage debt, and that the judgments were not entitled to priority over the mortgages. On the 18th of December, 1895, a final order was made by the court, directing Andrew F. Burleigh, as receiver, to pay the judgments. On January 20 the Farmers' Loan & Trust Company presented in the Circuit Court its petition for an appeal, and the appeal was allowed. Upon the same date it filed its three separate bonds to said Longworth, Bellinger, and Raskey and wife, for the costs and damages that might be awarded them on the appeal. Citation was issued, directed to Longworth, Raskey and wife, and Bellinger, and was served upon them on the 21st day of January, 1896. Neither the Northern Pacific Railroad Company, nor Andrew F. Burleigh, receiver, joined in the appeal; nor were they, or either of them, served with the citation. After the appeal was perfected in this court, and after a motion had been filed by the appellees to dismiss the same, the receiver, by his

attorney, entered in this court his appearance and consent to the appeal.

“In the case of *Owings vs. McKincannon*, 7 Pet. 399, a decree had been entered in the court below, directing the defendants to release to the complainant their right and title to certain real estate. A portion only of the defendants appealed. The court said:

“Upon principle, it would seem reasonable that the whole cause ought to be brought before the court, and that all the parties who are united in interest ought to unite in the appeal.”

And referring to the act of 1803 (2 Stat. 244), providing for appeals in equity cases, the court said:

“The language of the act which gives the appeal appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error.”

“In *Masterson vs. Herndon*, 10 Wall. 416, a bill of peace, and for the conveyance of a pretended title to a tract of land, was filed against one *Maverick* and one *Herndon*; and the decree was that complainant have and recover from the said *Maverick* and the said *Herndon* the said tract of land, and quited the complainant's title to the same. From this decree *Herndon* appealed, and, in his petition for appeal, alleged that his co-defendant refused to prosecute the appeal with him. In ordering the appeal dismissed in the Supreme Court, Mr. Justice Miller said:

“In chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: (1) That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed; (2) that the appellate tribunal shall not be required to decide a second or third time the same question, on the same record. * * *

We do not attach importance to the technical mode of proceeding called ‘summons and severance.’ We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appeal, should be a written notice, and due serve, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other; that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule

under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final, in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested."

"In *Hardee vs. Wilson*, 146 U. S. 179, 13 Sup. Ct. 39, Wilson, the complainant, filed his bill against Minor and his wife and Hardee, alleging that a conveyance of land made by the said Minor to himself as trustee for his wife, and a certain other deed of the same lands subsequently made to Hardee, were without consideration, and that they were made with the intention of putting said lands beyond reach of creditors, of whom the complainant was one. A decree was entered holding that the decree in favor of Minor and his wife was void, and that the deed to Hardee was security only for a certain debt due him. Hardee appealed, but his co-defendants did not join in the appeal, nor were they made parties thereto. It was held that Minor and his wife were necessary parties to the appeal, and the appeal was accordingly dismissed."

In the case of *Davis vs. Mercantile Trust Co.*, 152 U. S., 590, the Supreme Court of the United States, speaking through Justice Brewer, on page 594, said:

"Neither does the appeal from the decree stand in any better condition. In a decree for

the foreclosure of a mortgage the two parties principally and primarily interested are the mortgagee and the mortgagor. No third party should be permitted to disturb such a decree unless and until both mortgagee and mortgagor are given an opportunity to be heard. The mortgagor may be unwilling that the decree should be set aside, notwithstanding irregularities in prior proceedings, for fear that on a subsequent hearing a larger sum may be decreed against him. It is not necessary in any given case to determine that his interests would or would not be promoted by the setting aside of the decree; it is enough that in that matter he has a direct interest, and because of this interest common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside, without giving him a chance to be heard in its defense. Ordinarily it may be presumed that all the parties to the record are interested, and so it is often said that all such parties must be joined as appellants or appellees, plaintiffs in error or defendants in error; but it is unnecessary to rest this case upon the mere fact that the mortgagor in this case was a party to the record—the only defendant in the first instance. It was not only such a party, but is also one directly and vitally interested in the question whether the decree of foreclosure and sale shall stand, and yet it is not before us. The trustee is the only obligee named in the appeal bond, and while the citation on its face runs to all the

parties to the record, it was not served on the mortgagor, the Kenawha & Ohio Railway Company, and that company has never been brought into this court, and never entered an appearance here. This is fatal to the appeal."

The last case quoted involved the foreclosure of a mortgage in which parties who claimed certain interests were interested, and is directly in point.

In the case of *Loveless vs. Ransom*, 107 Fed., 627, Circuit Judge Jenkins, speaking for the Seventh Circuit, said:

"The rule is firmly established that, where a judgment or decree is joint, all the parties against whom it is rendered must join in the writ of error or appeal, unless there be summons and severance, or the equivalent. *William vs. Bank*, 11 Wheat. 414; *Owings vs. Kincannon*, 7 Pet. 399; *Wilson vs. Insurance Co.*, 12 Pet. 140; *Smyth vs. Strader*, 12 How. 327; *Masterson vs. Herndon*, 10 Wall, 416; *The protector*, 11 Wall, 82; *Hampton vs. Rouse*, 13 Wall, 187; *Simpson vs. Greeley*, 20 Wall, 152; *Feibelman vs. Packard*, 108 U. S. 14; *Estis vs. Trabue*, 128 U. S. 225; *Downing vs. McCartney*, 131 U. S. xeviii; *Mason vs. U. S.* 136 U. S. 581; *Dolan vs. Jennings*, 139 U. S. 385; *Hardee vs. Wilson*, 146 U. S. 179; *Ingelhart vs. Stansbury*, 151 U. S. 68; *Davis vs. Trust Co.*, 152 U. S. 590; *Sipperly vs. Smith*, 155 U. S. 86; *Railway Co. vs. Evans*, 175 U. S. 723; *Fordyce vs. Trigg*, 175 U. S. 723.

The Supreme Court has declared that the matter is jurisdictional, and may be raised at any time before final disposition of the appeal; and we have, in conformity with that ruling, so held in this court. *Hook vs. Trust Co.*, 36 C. C. A. 645; *Kidder vs. Safe Deposit Co.* (C. C. A.) 105 Fed. 821.

Provident Life & Trust Co. of Philadelphia vs. Camden & T. Ry. Co. et al, 177 Fed. 854.

For the foregoing reasons the judgment of the lower court should be affirmed or this appeal dismissed.

Respectfully submitted,
H. H. HENDERSON,
Attorney for Appellees.

NOTE—The case of *Shields vs. Barrows* is referred to in the printed record as 58 Fed. 129 and it should be 58 U. S. 129, Rec. 647, Judge Dietrich's opinion.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CONTINENTAL & COMMERCIAL TRUST & SAV-
INGS BANK, a Corporation, and FRANK H.
JONES,

Trustees—Appellants,

vs.

COREY BROS. CONSTRUCTION COMPANY, a Corpo-
ration, and UNION PORTLAND CEMENT
COMPANY, a Corporation,

Appellees.

Upon Appeal from the United States District Court for the
District of Idaho, Southern Division.

Reply Brief for Appellants.

MAYER, MEYER, AUSTRIAN & PLATT,
AMOS C. MILLER, Esq.,

Chicago, Ill.,

RICHARDS & HAGA,

Boise, Idaho,

Solicitors for Appellants.

FILED

MAY 19 1913

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2264.

CONTINENTAL & COMMERCIAL TRUST &
SAVINGS BANK, a Corporation, and
FRANK H. JONES, Trustees,
Appellants,

vs.

COREY BROS. CONSTRUCTION COMPANY,
a Corporation, and UNION PORTLAND
CEMENT COMPANY, a Corporation,
Appellees.

Reply Brief for Appellants.

First.

Counsel for appellee makes the point that this Court is without jurisdiction to hear this appeal because the other defendants than the appellants (the Irrigation Company and the lien claimants) were not cited.

The decree in this case was not a joint one against all defendants. The Irrigation Company was decreed to pay money to complainant. As to the appellants, the decree merely found their lien was inferior to that of complainant and intervenor. A similar finding was made as to the other defendants. The decree not being joint, the presence of all defendants is not jurisdictional.

The most that can be said against considering the present appeal, is that there is a theoretical possibility that other defendants might appeal. That the

possibility is merely theoretical is obvious from the admitted insolvency of the Irrigation Company, the fact that it remained supine in the trial court, and that the other defendants did nothing further in that court than to show that they were lien claimants with suits pending in the Idaho courts to foreclose the same.

Under such circumstances this Court, we submit, should not dismiss the appeal, and thereby merely cause further delay and expense to the litigants, and further unnecessary work for the Court. See

Coler vs. Allen, 114 Fed. 609.

Winters vs. United States, 207 U. S. 564.

Brewster vs. Wakefield, 22 How. 118, 16 L. Ed. 301.

Gilfillon vs. McKee, 159 U. S. 303.

Moreover, no motion to dismiss this appeal has been filed pursuant to Rule 21 of this Court. Hence, the point (not being jurisdictional) is waived.

Appellant's time to appeal does not expire until June 23d. If, therefore, this Court should conclude to dismiss this appeal, we respectfully ask that it be done in time to permit us to perfect a new appeal.

Second.

Opposing counsel takes the view that the evidence shows that the dam's foundation is inadequate, and that such defect is due to faulty plans; and that hence the leaking of the superstructure, concededly due to Corey's departure from the contract, is immaterial. For the sake of the argument, admitting the premises to be true, this is to say that if the owner of a foundation contracts with a builder for the erec-

tion thereon of a substantial house, the builder may depart from the plain terms of the contract and thus produce an unsubstantial house, unfit to live in; and then enforce a lien upon the whole on the theory that there is a question about the stability of the foundation, and that hence a better house would not benefit the owner. This position is opposed not only to the authorities cited on pages 66 to 71 of our brief (and appellee has not even attempted to meet them), but also to the plain logic of the situation. The owner, having contracted for a substantial house, cannot be put off with less; but, on the contrary, is entitled to take his chances on the questionable foundation, or to strengthen it beyond question, whichever he may elect; thus having it in his discretion to make the whole structure absolutely safe, or leave uncertain the safety of a part.

In this case the evidence shows *without dispute* (see Storrow's testimony) that all question of the safety of the foundation of this dam could be removed by the digging and back-filling of a trench twenty feet deep at the upper toe of the dam. Must the Court say that the owner shall not (assuming that the defect in the foundation is the owner's fault) have the privilege of so securing the foundation, and thus acquiring a perfectly good dam, but that, having committed a curable fault in the foundation, it must for that reason pay for a *fatally* defective superstructure?

Appellee presents no excuse for this fatal defect in the superstructure except the *acquiescence* of the friendly Drummond, and his alleged authority to

“interpret” the contract, plans and specifications. It is elementary law that plain provisions do not require or permit of *interpretation*. This contract was not obscure in its provisions as to dumping from diagonal trestles.

If Drummond had authority to cause the rejection of work that was poor, or violated a specific provision of the contract, that did not bind the owner to accept such work if Drummond failed to reject it. This power to the engineer was merely an additional safeguard to the owner. (See United States vs. Walsh, 115 Fed. 701, and the other cases appearing in our brief, pages 62 to 65.)

Third.

Appellee says that the first answer filed on behalf of the bondholders' trustees did not specifically point out the faults in the work of complainant; that the first answer was like the answer of the Irrigation Company, and that these specific departures appeared in the amended answer filed one year later.

In answer we say, *first*, that paragraph 9 of the first answer specifically denied that complainant observed its contract in constructing the works; and, *second*, that by opposing counsel's own admission, this intervening year, during which this litigation lay quiescent was consumed in negotiations for a settlement which would permit the raising of money to rebuild and complete the dam. Pending such negotiations it is not strange that the interested parties refrained from unnecessarily making public record of the deplorable condition of this dam.

Appellee also claims that Rosecrans and Ralph

Arnold (both of the Arnold Co.) in 1910 admitted that Corey Bros.' work on this dam was well done. Not only do both Rosecranz and Ralph Arnold deny any such statements, but they also deny all personal knowledge, *Rosecranz not having seen the works for one year, and Arnold never having seen the works and not being an engineer.* (See affidavits of Rosecranz and Arnold, Rec. 148-149). If these two witnesses, having no conceivable interest so to do, falsely denied those alleged admissions, then it is a complete answer to counsel's inferences to say, *first*, that these men got whatever information they had from the subservient Drummond, and their misinformation would not have been surprising; and, *second*, that Trowbridge & Niver Co. had recently ceased business because of insolvency (see Wayman's testimony, p. 448 et seq.), and efforts were being made to refinance the system through other sources; and the claim is made that to aid this attempted refinancing, Ralph Arnold and Rosecranz, both of whom admittedly lacked all personal knowledge, denied the State's claim that Corey's work was bad. These alleged admissions of Rosecranz and Ralph Arnold were not asserted to impeach their testimony; they were in no position to make admissions for the Irrigation Company (Rosecranz had already left the Arnold Co.); the statements, if made, were not made under convincing circumstances; did not tend to impeach the witnesses, and as substantive proof of the sufficiency of the dam, or the compliance by Corey with his contract, they are, we submit, utterly without weight.

Fourth.

The carelessness of opposing counsel in handling the evidence led him, in his oral argument, into one error which we cannot properly omit to mention. He said that Rosecranz said, in speaking of the work of complainant on this system, "I have no fault to find." If this statement were accurate it would be significant indeed. The fact is, however, that this statement applied to the work that Rosecranz saw in progress *almost one year before the State stopped the work on the dam, and before this diagonal dumping was begun.* (Rec. 379.) And it apparently referred to work on the headgates of canals.

Fifth.

Appellee lays stress on the fact that Corey received an estimate *after* the State had stopped work upon the dam. The inference is drawn that this was in the nature of a final certificate. The record shows, however, that this was merely the usual monthly estimate for work done during that month—made in the usual course of business, and while the interested parties were trying to refinance after the failure of Trowbridge & Niver Co., so as to be in position to induce the State to permit the resumption of the work and the rebuilding of the dam. The issuance of that certificate has no legal significance (see authorities cited), and as evidence of compliance by Corey, the circumstances are such, we submit, as to give it no weight.

Sixth.

During the oral argument, appellee's counsel in words admitted that complainant has no lien on the

water contracts which are assigned to these appellants as security for the bonds.

Why, then, should the decree so read as to cloud our title to these contracts?

The bill of complaint asks that these contracts be sold. Complainant's counsel stated as frankly to the District Court as he had stated here, that although asking that relief he did not expect it. It therefore should not be necessary to argue that complainant is not entitled to it. Those \$1,800,000 of water contracts (constituting mortgages upon the water rights acquired by the settlers from the Irrigation Company and upon the lands to be watered) are an asset in the hands of the trustees. The Court below, though requested, refused to so modify complainant's draft of decree as to show that this collateral in our hands was not to be sold, nor our rights therein affected; but preferred to leave that to future litigation. We submit that to leave to future litigation between one of these parties and the successor to the other, a question that can be settled now; and while clouding our title to this collateral, leaving the whole matter in such shape that a purchaser would frame his bid with reference to the certainty that he was purchasing a lawsuit, is unjustifiable from every standpoint. If our title to that collateral is not to be affected as asked in the bill, the decree should so state. If the *basis* of that collateral (viz., the title of the settlers) is to be affected, then those settlers should be made parties. If that basis is not to be

wiped out, the interest of the bondholders demands that the decree should so state.

Respectfully submitted,
MAYER, MEYER, AUSTRIAN & PLATT,
AMOS C. MILLER,
RICHARDS & HAGA,
For Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAN PEDRO, LOS ANGELES & SALT LAKE RAIL-
ROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

MARTINI DAVIDE,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Southern District of California, Southern Division.

FILED

JUL 1 - 1913

No. 2266

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAN PEDRO, LOS ANGELES & SALT LAKE RAIL-
ROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

MARTINI DAVIDE,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Southern District of California, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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BURT CHELLIS, Esq., 901 Higgins Building, Los Angeles, California.

CHAS. E. DONNELLY, Jr., Esq., 706 American Bank Building, Los Angeles, California.

Messrs. HARRIS & SWANWICK, 704-8 American Bank Building, Los Angeles, California. [4*]

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

*Page-number appearing at foot of page of original certified Record.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to
the Judges of the District Court of the United
States, Southern District of California, South-
ern Division, Greeting:

Because in the record and proceedings, and also
in the rendition of the verdict and judgment of a
plea which is in the said District Court before you,
between San Pedro, Los Angeles & Salt Lake Rail-
road Company, plaintiff in error, and Martini Da-
vide, defendant in error, a manifest error hath hap-
pened to the great damage of the said plaintiff in
error, San Pedro, Los Angeles & Salt Lake Railroad
Company, as by its complaint appears, and it being
fit that the error, if any there hath been, should be
duly corrected and full and speedy justice done to
the parties aforesaid in this behalf, you are hereby
commanded, if judgment be therein given, that then,
under your seal, distinctly and openly, you send the
record and proceedings aforesaid, with all things
concerning the same, to the United States Circuit
Court of Appeals for the Ninth Circuit, together
with this writ, so that you have the same at the City
of San Francisco, in the State of California, on the
18th day of March next, in the Circuit [5] Court
of Appeals, to be then and there held, that the rec-
ord and proceedings aforesaid be inspected, the said
United States Circuit Court of Appeals may cause
further to be done therein to correct that error, what
of right and according to the law and custom of the

United States should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 17th day of February, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States, the one hundred and thirty-seventh.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States,
Southern District of California, Southern Division.

The above writ of error is hereby allowed.

Dated, the 17th day of February, 1913.

OLIN WELLBORN,

Judge.

I hereby certify that a copy of the within writ of error was on the —— day of ———, 1913, lodged in the clerk's office of the said District Court of the United States, Southern District of California, Southern Division for the said Defendant in Error.

Clerk of the District Court of the United States,
Southern District of California, Southern Division. [6]

I hereby certify that a copy of the within writ of error was on the 17th day of February, 1913, lodged in the clerk's office of the said United States District

Court for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By Chas. N. Williams,
Deputy.

[Endorsed]: No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Writ of Error. Filed Feb. 17, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [7]

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Citation on Writ of Error.

United States of America,—ss.

To Martini Davide, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 18th

day of March, 1913, pursuant to a writ of error on file in the clerk's office of the District Court of the United States, Southern District of California, Southern Division, in that certain action No. 1636, wherein San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against said San Pedro, Los Angeles & Salt Lake Railroad Company in said writ of error mentioned should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable OLIN WELLBORN, United States District Judge for the Southern District of California, Southern Division, this 17th day of February, 1913, and of the Independence of the United States the 137th.

OLIN WELLBORN,
United States District Judge for the Southern District of California, Southern Division. [8]

[Endorsed]: No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Citation on Writ of Error. Filed Feb. 17, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within Citation this 17 day of Feb. 1913. Burt Chellis, Chas. E. Donnelly Jr., and Harris & Swanwick, Solicitors for Pl. 2 Com. L. R. B. 68. [9]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Complaint for Damages.

Comes now plaintiff above named and complains of defendant and for cause of action alleges:

I.

That plaintiff is, and at all of the times hereinafter alleged has been, a citizen of the State of California, and a resident of the County of Los Angeles in the Southern Division of the Southern District of California.

II.

That defendant now is, and at all of the times hereinafter alleged has been, a corporation duly organized and existing under the laws of the State of Utah. That at all of said times defendant has been and still is doing business in the State of California.

That defendant at all of said times has been and now is engaged in commerce as a common carrier by railroad between the State of California and the State of Utah; that defendant owns and operates a line of railroad between said States; that said railroad passes through a portion of the State of

Nevada, and is operated by the defendant in said State.

III.

That upon the 25th day of April, 1911, plaintiff was, [11] and for a period of several days prior thereto had been regularly employed by defendant in the capacity of and repairing the said main line track of defendant between the stations of Las Vegas and Caliente in the State of Nevada.

IV.

That upon said date, and while plaintiff was so employed and engaged as aforesaid, plaintiff was riding upon and assisting in propelling a certain hand-car between said stations of Las Vegas and Caliente, at a point about nine miles west of Caliente, in said State of Nevada; that said hand-car at said time was owned, operated and used by defendant in connection with the care and maintenance of its said main line track, and in connection with the work in which plaintiff was engaged as aforesaid; that plaintiff in riding upon and assisting in propelling said hand-car as aforesaid was acting under and in accordance with the orders and directions of a section foreman; that said section foreman at said time was regularly employed by defendant as such section foreman in connection with said work upon defendant's said main line track.

That upon said 25th day of April, 1911, said plaintiff was, in the regular course of his employment as such sectionman, so riding upon and assisting in propelling said hand-car, another hand-car, which said last-named hand-car was owned, operated, and used

by defendant, in the care of and repairs to its said main line track, and which was being propelled by certain other employees of said defendant, ran against and struck the hand-car upon which said plaintiff was riding as aforesaid; that said hand-car struck the hand-car upon which plaintiff was riding as aforesaid with great force and violence; that the shock and collision of said hand-cars was such that plaintiff, by reason of said shock and collision, was violently thrown from the hand-car upon which [12] he was riding as aforesaid, and fell upon the track of defendant in front of said hand-car; that the wheels of said hand-car upon which said plaintiff was riding as aforesaid ran over and mangled the left hand of plaintiff; that the employees of defendant who were propelling the said hand-car, which struck the hand-car upon which plaintiff was riding, operated the same in a careless and negligent manner.

V.

That said accident was not caused by any fault or negligence on the part of said plaintiff but was caused by the negligence of said defendant and its employees as hereinbefore set forth; that when plaintiff was injured as aforesaid he was engaged in work required of him by said defendant.

VI.

That on account of said injury, plaintiff suffered great bodily pain; that said suffering continued for a long time after said 25th day of April, 1911; that on account of said injury to plaintiff it was necessary to amputate the left hand of plaintiff at the wrist.

That plaintiff's left hand was so amputated; that on account of said injury plaintiff was confined in a hospital for about five weeks; that on account of the amputation of plaintiff's left hand, as aforesaid, he will always be maimed and unable to follow his occupation or to perform many other kinds of work for which he was fitted, but, on the contrary, must be handicapped through life and compelled to fit himself for a wholly different line of work than he had been engaged in prior to said injury.

VII.

That plaintiff, at the time of his said injury, was forty-eight years of age, and prior to said injury was in good health, perfectly well, physically strong, and capable of performing severe manual labor. [13]

VIII.

That by reason of said injuries to said plaintiff, as hereuntofore set forth, caused by the negligence and carelessness of the defendant, plaintiff has suffered damages in the sum of TEN THOUSAND (\$10,000.00) DOLLARS.

WHEREFORE plaintiff prays judgment against defendant for said sum of TEN THOUSAND DOLLARS (\$10,000.00), together with his costs herein.

BURT CHELLIS and
HARRIS & SWANWICK,
Attorneys for Plaintiff. [14]

State of California,
County of Los Angeles,—ss.

Martini Davide, being first duly sworn, deposes and says: That he is the plaintiff in the foregoing Complaint; that he has read the same and knows the

contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and that as to those matters, he believes the same to be true.

[Seal]

MARTINI DAVIDE.

Subscribed and sworn to before me this 19th day of June, A. D. 1911.

W. E. STOWELL,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. 1636. In the Circuit Court of the United States, 9th Circuit, Southern District of California, Southern Division. Martini Davide, Plaintiff, vs. San Pedro, Los Angeles & Salt Lake Railroad Company, a Corporation, Defendant. Complaint for Damages. Received copy of the within this —— day of ———, 1911. Filed Jul. 3, 1911. Wm. M. Van Dyke. By Chas. N. Williams, Deputy Clerk. Burt Chellis and Harris & Swanwick, Attys. for Plff., Los Angeles, Cal. [15]

[Summons].

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit,
Southern District of California, Southern Division.*

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT
LAKE RAILROAD COMPANY, a Corpora-
tion,

Defendant.

Action brought in the said Circuit Court and the
Complaint filed in the office of the Clerk of said
Circuit Court, in the City of Los Angeles,
County of Los Angeles.

The President of the United States of America,
Greeting: To the San Pedro, Los Angeles and
Salt Lake Railroad Company, a Corporation.

You are hereby required to appear in an action
brought against you by the above-named plaintiff, in
the Circuit Court of the United States, Ninth Cir-
cuit, in and for the Southern District of California,
Southern Division, and to file your plea, answer or
demurrer to the complaint filed therein (a certified
copy of which accompanies this summons), in the
office of the Clerk of said court in the City of Los
Angeles, County of Los Angeles, within twenty days
after the service on you of this summons, or judgment
by default will be taken against you.

The said action is brought to recover the sum of \$10,000.00 as damages for personal injuries alleged by plaintiff to have been suffered by him. Plaintiff further alleges that said injuries were caused by the negligence and carelessness of the defendant. Plaintiff further prays judgment for his costs herein; all of which more fully appears from the complaint on file [16] in this action, to which you are hereby expressly referred, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the Court for the relief demanded in the complaint.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this seventh day of July, in the year of our Lord one thousand nine hundred and eleven and of our Independence the one hundred and thirty-sixth.

[Seal]

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

United States Marshal's Office,
Southern District of California.

I hereby certify that I received the within writ on the 8 day of July, 1911, and personally served the same on the 8 day of July, 1911, be delivering to and leaving with R. G. Wells, Gen. Mgr., said defendant named therein personally, at the County of Los Angeles in said District, a certified copy thereof, to-

gether with a copy of the complaint, certified to by Wm. M. Van Dyke, attached thereto.

LEO V. YOUNGWORTH,

U. S. Marshal.

By Ervin Dingle,

Deputy.

Los Angeles, July 8, 1911.

[Endorsed]: Marshal's Civil Docket No. 1726. Original. No. 1636. [17] U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Martini Davide, Plaintiff, vs. San Pedro, Los Angeles and Salt Lake Railroad Company, a Corporation, Defendant. Summons. Burt Chellis, Harris & Swanwick, Plaintiff's Attorney. Filed Jul. 10, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [18]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT
LAKE RAILROAD COMPANY, a Corpora-
tion,

Defendant.

Demurrer to Complaint.

Comes now the defendant, San Pedro, Los Angeles

& Salt Lake Railroad Company, and demurs to the complaint herein, for the following reasons, to wit:

1. Said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays that it may be dismissed hence with its costs.

A. S. HALSTED,
W. F. PALMER,

Attorneys for Defendant.

I hereby certify that in my opinion the above demurrer is well founded in law.

W. F. PALMER,
Attorney for Defendant.

[Endorsed]: No. 1636. U. S. Circuit Court, Ninth District, Southern District of California, Southern Division. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Demurrer. Filed Jul. 28, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. [19] Williams, Deputy Clerk. Received Copy of the Within Burt Chellis this 28th day of July, 1911. A. S. Halsted, W. F. Palmer, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitors for Defendant. [20]

At a stated term, to wit, the July Term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the Courtroom, in the City of Los Angeles, on Monday, the second day of October, in the year of our Lord one thousand

nine hundred and eleven. Present: The Honorable OLIN WELLBORN, District Judge.

[Order Overruling Demurrer, etc.]

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT
LAKE RAILROAD COMPANY,

Defendant.

This cause coming on this day to be heard on defendant's demurrer to plaintiff's complaint, J. W. Swanwick, Esq., appearing as counsel for plaintiff, and W. F. Palmer, Esq., appearing as counsel for defendant, and said demurrer having been argued by counsel for the respective parties, it is now by the Court ordered that said demurrer be, and the same hereby is, overruled, with leave to defendant to answer within twenty (20) days.

[Endorsed]: C. C. No. 1636. United States District Court, Southern District of California, Southern Division. Martini Davide, Plaintiff, vs. San Pedro, Los Angeles & Salt Lake R. R. Co., Defendant. Copy of Order. Filed Nov. 29, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [21]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT
LAKE RAILROAD COMPANY, a Corpora-
tion,

Defendant.

Answer.

Comes the defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, and for answer to the complaint herein, avers:

I.

That it has not sufficient information or belief to enable it to answer the allegations contained in paragraph 1 of said complaint, and basing its denial upon such ground, denies each and every allegation therein contained.

II.

It denies that the hand-car upon which it is alleged that plaintiff was riding, was being used and operated, or used or operated, in connection with the care and maintenance, or care or maintenance, of its main line of track; it denies that plaintiff was assisting in propelling a hand-car between the stations of Las Vegas and Caliente, in the State of Nevada, or at any other place; it denies that at the time of the alleged

injury of plaintiff, as mentioned in said complaint, that plaintiff was assisting in propelling said hand-car, and denies that at said time plaintiff was acting under and in accordance with, or under or in accordance with, the orders and directions, or orders or directions, of a section foreman; it denies that on the 25th day of April, 1911, or at the time of the plaintiff's alleged injury, the plaintiff was in the regular course of his employment as a section man, or at all, assisting in propelling said hand-car, and denies that [22] another hand-car, owned, or operated, or used, or owned, operated and used by defendant in the care of and repairs to, its main line of track, and which was being propelled by certain other employees of defendant, or any other persons, ran against and struck or ran against or struck, the hand-car upon which said plaintiff was riding as aforesaid; denies that any hand-car ran upon or against, or struck the hand-car upon which plaintiff was riding; denies that said hand-car, or any hand-car, struck the hand-car upon which plaintiff was riding as aforesaid, with great force and violence, or at all struck said hand-car; denies that the shock and collision, or shock or collision of said hand-cars was such that plaintiff, by reason of said shock and collision, or shock or collision, was violently, or at all, thrown from the hand-car upon which he was riding as aforesaid, and fell upon the track of defendant in front of said hand-car; denies that the wheels of said hand-car upon which plaintiff was riding, ran over and mangled or ran over or mangled, the left hand of plaintiff; denies that the employees of defendant who were pro-

PELLING said hand-car, which is alleged to have struck the hand-car upon which plaintiff was riding, operated the same in a careless and negligent manner, or careless or negligent manner.

III.

Defendant denies that said accident was caused by any fault or negligence on the part of the plaintiff; denies that said accident, or any accident, to the plaintiff was caused by the negligence of said defendant, and its employees, or said defendant or its employees, as set forth in said complaint, or at all, and denies that when the plaintiff was injured as alleged in said complaint, he was engaged in work required of him by this defendant.

IV.

This defendant has not sufficient information or belief as [23] to the matters alleged in paragraphs 6 and 7 of said complaint to enable it to answer the same, and basing its denial upon such ground, denies each and every allegation therein contained.

V.

Defendant denies that the plaintiff was injured by the negligence or carelessness, or negligence or carelessness, of the defendant, and denies that by reason of any injury which the plaintiff received because of the negligence and carelessness, or negligence or carelessness, of the defendant, the plaintiff suffered damages in the sum of \$10,000, or any damage whatever.

SECOND.

For a further separate answer to said complaint, defendant avers that any injuries which the plaintiff

may have received at the time and place mentioned in said complaint, were caused by, and the result of, the negligence, carelessness and recklessness of the plaintiff himself in jumping from one of the hand-cars mentioned in said complaint to the other while the same were in motion, and defendant avers that while the plaintiff was so engaged he fell between the said hand-cars and was then and there injured, without any negligence whatever on the part of this defendant or any of its employees.

THIRD.

For a further separate answer to said complaint, defendant avers that the plaintiff was playfully jumping from one of the hand-cars mentioned in said complaint to the other while said hand-cars were in motion, and defendant avers that whatever injury the plaintiff suffered, was the result of a risk which the plaintiff assumed, and was not the result of any negligence on the part of the defendant or any of its employees.

FOURTH.

For a further separate answer to said complaint, defendant avers that at the time the plaintiff suffered the injuries alleged in the complaint, if any he did so suffer, the plaintiff was not [24] engaged or employed in any act of interstate commerce, and was not performing any act for which he was employed by this defendant, and was not performing any act which he had been ordered to perform by any of the defendant's agents or servants, and the act of the plaintiff which resulted in the alleged injuries to plaintiff, was not an act of interstate commerce, nor

was either the plaintiff or defendant, at said time and place, engaged in interstate commerce, but this defendant avers that at the time said alleged injury to plaintiff occurred, plaintiff was riding upon one of defendant's hand-cars upon its railroad between Las Vegas, Nevada, and Caliente, Nevada; that said hand-cars were not engaged in carrying interstate commerce, and at no time during all of the times alleged in said complaint, were said hand-cars or either of them, or the said employees of the defendant, or either of them, engaged in transporting freight from one State to another, nor doing any other act of interstate commerce, but were employed within the State of Nevada only, and defendant avers that at the time of the alleged injury aforesaid, the said plaintiff was not engaged in any act of commerce, either interstate or intrastate, but was engaged in play of his own accord and for his own amusement, and while so engaged in such play, said plaintiff was jumping from one hand-car to another and fell between the same and so was injured, without any fault or negligence on the part of this defendant, or any or either of its employees.

WHEREFORE, this defendant prays that it may be hence dismissed with judgment for its costs, and for all other relief proper in the premises.

A. S. HALSTED.

W. F. PALMER,

Attorneys for Defendant. [25]

State of California,
County of Los Angeles,—ss.

W. H. Comstock, being first duly sworn, deposes

and says that he is the Secretary of San Pedro, Los Angeles & Salt Lake Railroad Company, the defendant in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon his information and belief, and as to those matters he believes it to be true.

W. H. COMSTOCK.

Sworn to and subscribed before me, this 12th day of October, 1911.

[Seal]

FRANCIS J. MIEDING,
Notary Public.

[Endorsed]: Original. No. 1636. U. S. Circuit Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. San Pedro, Los Angeles & Salt Lake R. R. Co., Defendant. Answer. Filed Oct. 23, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received Copy of the Within 23 this 23d day of Oct. 1911. Burt Chellis, A. S. Halsted & W. F. Palmer, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [26]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Amended Complaint.

Leave of Court being first duly had and obtained, comes now plaintiff herein and files this his Amended Complaint as follows:

I.

That plaintiff is, and at all of the times hereinafter alleged has been, a citizen of the State of California, and a resident of the County of Los Angeles in the Southern Division of the Southern District of California.

II.

That defendant now is, and at all of the times hereinafter alleged has been, a corporation duly organized and existing under the laws of the State of Utah. That at all of said times defendant has been and still is doing business in the State of California.

That defendant at all of said times has been and now is engaged in commerce as a common carrier by railroad between the State of California and the

State of Utah; that defendant owns and operates a line of railroad between said States; that said railroad passes through a portion of the State of Nevada, and is operated by the defendant in said State.

III.

That upon the 25th day of April, 1911, plaintiff was, and [27] for a period of several days prior thereto had been regularly employed by defendant in the capacity of a section-hand and was engaged in repairing the said main line track of defendant between the stations of Las Vegas and Caliente in the State of Nevada.

IV.

That upon said last-mentioned date, and while plaintiff was so employed and engaged, as aforesaid, plaintiff was riding upon and assisting in propelling a certain hand-car between said stations of Las Vegas and Caliente at a point about nine miles west of Caliente, in said State of Nevada; that said hand-car at said time was owned, operated and used by defendant in connection with the work in which plaintiff was engaged, as aforesaid; that plaintiff in riding upon and assisting in propelling said hand-car, as aforesaid, was acting under and in accordance with the orders and directions of a section foreman, that said section foreman at said time was regularly employed by defendant as such section foreman in connection with said work upon defendant's said main line track.

That upon said 25th day of April, 1911, and while plaintiff was so employed and engaged, as aforesaid, and while said plaintiff was riding upon and assist-

ing in propelling said hand-car between said stations of Las Vegas and Caliente, as aforesaid, another and different hand-car, which said last-mentioned hand-car was also at said time owned, operated and used by defendant in the care of and in making repairs to its said main line track, was being at said time propelled by defendant at a high rate of speed upon and along said main line of track in advance of and in front of the said hand-car upon which plaintiff was riding, as aforesaid; that said other hand-car, so operated at a high rate of speed, as aforesaid, passed along said main line of track in advance of and ahead of the said hand-car upon which plaintiff [28] was riding as aforesaid; that while said other hand-car was so being propelled and operated at a high rate of speed along the same main line track of defendant ahead of and in advance of the said car upon which plaintiff was riding, as aforesaid, the speed of said other hand-car, which was so being operated in advance of the said car upon which plaintiff was riding, as aforesaid, was suddenly materially slackened and lessened; that plaintiff had no means of knowing at any of said times hereinbefore mentioned, and at none of said times did know that the speed of said other hand-car which had so advanced along said main line track in front of and in advance of the said hand-car upon which plaintiff was riding, as aforesaid, would be or had been materially or at all slackened or lessened, as aforesaid. That shortly after the slackening and lessening of the speed of said other hand-car, as aforesaid, and because thereof, the said hand-car

upon which plaintiff was riding, as aforesaid, ran against and with great force and violence struck the said other hand-car which had so advanced along said main line track in advance of the said hand-car upon which plaintiff was riding, as aforesaid.

That the shock and collision of said hand-cars was such that plaintiff, by reason of said shock and collision was violently thrown from the hand-car upon which he was riding, as aforesaid, and fell upon the track of defendant in front of said last-mentioned hand-car; that the wheels of said last-mentioned hand-car, upon which plaintiff had been riding, as aforesaid, ran over and mangled the left hand of plaintiff; that the employees of defendant who were propelling the said other hand-car which had so advanced along said main line track ahead of and in front of the car on which plaintiff was riding, as aforesaid, operated the same in a careless and negligent manner, in so suddenly materially slackening and lessening the speed of said hand-car, as hereinbefore alleged. [29]

V.

Said accident was not caused by any fault or negligence on the part of said plaintiff but was caused by the negligence of said defendant and its employees as hereinbefore set forth; that when plaintiff was injured, as aforesaid, he was engaged in work required of him by said defendant.

VI.

That on account of said injury plaintiff suffered great bodily pain; that said suffering continued for a long time after said 25th day of April, 1911; that

on account of said injury to plaintiff it was necessary to amputate the left hand of plaintiff at the wrist. That plaintiff's left hand was so amputated; that on account of said injury plaintiff was confined in a hospital for about five weeks; that on account of the amputation of plaintiff's left hand, as aforesaid, he will always be maimed and unable to follow his occupation or to perform many other kinds of work for which he was fitted, but, on the contrary, must be handicapped through life and compelled to fit himself for a wholly different line of work than that he had been engaged in prior to said injury.

VII.

That plaintiff, at the time of his said injury, was — years of age and prior to said injury was in good health, perfectly well, physically strong, and capable of performing severe manual labor.

VIII.

That by reason of said injuries to said plaintiff, as hereinbefore set forth, caused by the negligence and carelessness of the defendant, plaintiff has suffered damages in the sum of Ten Thousand (\$10,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against defendant for [30] said sum of Ten Thousand Dollars (\$10,000.00), together with his costs herein.

BURT CHELLIS,

HARRIS & SWANWICK,

Attorneys for Plaintiff.

State of California,

County of Los Angeles,—ss.

Martini Davide, being first duly sworn, deposes

and says: That he is the plaintiff named in the foregoing Complaint; that he has read the same and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief and that as to those matters, he believes the same to be true.

MARTINI DAVIDE.

Subscribed and sworn to before me this 27th day of November, 1912.

[Seal]

WM. M. VAN DYKE,

Clerk, U. S. District Court, Southern District of California.

[Endorsed]: 1636. Original. In the United States Circuit Court, Ninth Circuit, Southern District of California. Martini Davide, Plaintiff vs. San Pedro, Los Angeles & Salt Lake Railroad Company, a Corporation, Defendant. Amended Complaint. Filed November 27th 1912. Wm. M. Van Dyke, Clerk. Harris & Swanwick, Attorneys and Counselors at Law, 704 to 708 American Bank Bldg., 129 West Second Street, Los Angeles, Cal., and Burt Chellis, Attorney for Plaintiff. [31]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Second Amended Complaint.

Leave of Court being first duly had and obtained, comes now plaintiff herein and files this his second amended complaint as follows: Plaintiff alleges:

I.

That plaintiff is and at all of the times hereinafter alleged has been a citizen of the State of California, and a resident of the County of Los Angeles in the Southern Division of the Southern District of California.

II.

That defendant now is, and at all of the times hereinafter alleged has been, a corporation duly organized and existing under the laws of the State of Utah. That at all of said times defendant has been and still is doing business in the State of California.

That defendant at all of said times has been and now is engaged in commerce as a common carrier by railroad between the State of California and the State of Utah; that defendant owns and operates a

line of railroad between said States; that said railroad passes through a portion of the State of Nevada, and is operated by the defendant in said State.

III.

That upon the 25th day of April, 1911, plaintiff was, and [32] for a period of several days prior thereto had been regularly employed by defendant in the capacity of a section-hand, and was engaged in repairing the said main line track of defendant between the stations of Las Vegas and Caliente in the State of Nevada.

IV.

That upon said last-mentioned date, and while plaintiff was so employed and engaged, as aforesaid, plaintiff was riding upon and assisting in propelling a certain hand-car between said stations of Las Vegas and Caliente, at a point about nine miles west of Caliente, in said State of Nevada; that said hand-car at said time was owned, operated and used by defendant in connection with the work in which plaintiff was engaged, as aforesaid; that plaintiff in riding upon and assisting in propelling said hand-car, as aforesaid, was acting under and in accordance with the orders and directions of a section foreman; that said section foreman at said time was regularly employed by defendant as such section foreman in connection with said work upon defendant's said main line track.

That upon said 25th day of April, 1911, and while plaintiff was so employed and engaged, as aforesaid, and while said plaintiff was riding upon and assisting in propelling said hand-car between said stations

of Las Vegas and Caliente, as aforesaid, another and different hand-car, which said last-mentioned hand-car was also at said time owned, operated, and used by defendant in the care of and in making repairs to its said main line track, was being at said time propelled by defendant at a high rate of speed upon and along said main line of track in advance of and in front of the said hand-car upon which plaintiff was riding, as aforesaid, that said other hand-car, so operated at a high rate of speed, as aforesaid, passed along said main line track in advance of and ahead of the said hand-car upon which plaintiff was riding, as [33] aforesaid; that while said other hand-car was so being propelled and operated at a high rate of speed along the said main line track of defendant ahead of and in advance of the said car upon which plaintiff was riding, as aforesaid, the speed of said other hand-car, which was so being operated in advance of the said car upon which plaintiff was riding, as aforesaid, was suddenly materially slackened and lessened; that plaintiff had no means of knowing at any of said times hereinbefore mentioned, and at none of said times did know that the speed of said other hand-car which had so advanced along said main line track in front of and in advance of the said hand-car upon which plaintiff was riding, as aforesaid, would be or had been materially or at all slackened or lessened, as aforesaid. That shortly after the slackening and lessening of the speed of said other hand-car, as aforesaid, and because thereof, the said hand-car upon which plaintiff was riding, as aforesaid, ran against and with great force

and violence struck the said other hand-car which had so advanced along said main line track in advance of the said hand-car upon which plaintiff was riding, as aforesaid.

That shortly thereafter another and different hand-car which was then and there owned, operated and controlled by defendant upon said main line of track ran into and collided with the said hand-car upon which plaintiff was riding, as aforesaid.

That the shock and collision of said hand-cars was such that plaintiff, by reason of said shock and collision was violently thrown from the hand-car upon which he was riding, as aforesaid, and fell upon the track of defendant in front of said last-mentioned hand-car; that the wheels of said last-mentioned hand-car, upon which plaintiff had been riding, as aforesaid, ran over and mangled the left hand of plaintiff; that the employees of defendant who were propelling the said other hand-car which had so advanced along said main line track ahead of and in front of the [34] car on which plaintiff was riding, and the employees of defendant who were propelling the said hand-car which ran into and collided with the hand-car upon which plaintiff was riding, as aforesaid, operated the said respective hand-cars in a careless and negligent manner, in so suddenly materially slackening and lessening the speed of said hand-car, as hereinbefore alleged, and in running into and colliding with the hand-car upon which plaintiff was riding, as aforesaid, respectively.

V.

Said accident was not caused by any fault or negligence on the part of said plaintiff but was caused by the negligence of said defendant and its employees as hereinbefore set forth; that when plaintiff was injured, as aforesaid, he was engaged in work required of him by said defendant.

VI.

That on account of said injury, plaintiff suffered great bodily pain; that said suffering continued for a long time after said 25th day of April, 1911; that on account of said injury to plaintiff it was necessary to amputate the left hand of plaintiff at the wrist. That plaintiff's left hand was so amputated; that on account of said injury plaintiff was confined in a hospital for about five weeks; that on account of the amputation of plaintiff's left hand, as aforesaid, he will always be maimed and unable to follow his occupation or to perform many other kinds of work for which he was fitted, but, on the contrary, must be handicapped through life and compelled to fit himself for a wholly different line of work than that he had been engaged in prior to said injury.

VII.

That plaintiff, at the time of his said injury, was — years of age and prior to said injury was in good health, perfectly well, physically strong, and capable of performing severe [35] manual labor.

VIII.

That by reason of said injuries to said plaintiff, as hereinbefore set forth, caused by the negligence and carelessness of the defendant, plaintiff has suffered

damages in the sum of Ten Thousand (\$10,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against defendant for said sum of Ten Thousand (\$10,000.00) Dollars, together with his costs herein.

BURT CHELLIS,

CHAS. E. DONNELLY, Jr.,

HARRIS & SWANWICK,

Attorneys for Plaintiff.

State of California,

County of Los Angeles,—ss.

Martini Davide, being first duly sworn, deposes and says; that he is the plaintiff named in the foregoing complaint; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and that as to those matters, he believes the same to be true.

MARTINI DAVIDE.

Subscribed and sworn to before me this 29th day of November, 1912.

[Seal]

WM. M. VAN DYKE,

Clerk U. S. District Court, So. Dist. of Cali.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: Original. No. 1636. In the Circuit Court of the United [36] States, Ninth Circuit, Southern District of California, Southern Division. Martini Davide, Plaintiff, vs. San Pedro, Los Angeles and Salt Lake Railroad Company, a Corporation, Defendant. Second Amended Complaint. Re-

ceived copy of within Second Amended Complaint this 29th day of November, 1912. Pennel Cherrington, Attorney for Defendant. Filed Nov. 29, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Harris & Swanwick, Attorneys and Counselors at Law, 704 to 708 American Bank Bldg., 129 West Second St., Los Angeles, Cal., and Burt Chellis, Attorney for Plaintiff. [37]

[Verdict.]

*In the District Court of the United States, for the
Southern District of California, Southern
Division.*

C. C. No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE
RAILROAD COMPANY,

Defendant.

We, the jury in the above-entitled cause, find in favor of the plaintiff in the sum of \$2750.00.

Los Angeles, November 29, 1912.

A. G. BARTLETT,

Foreman.

[Endorsed]: C. C. No. 1636. U. S. District Court, Southern District of California. Martini Davide vs. San Pedro, Los Angeles & Salt Lake R. R. Co. Verdict. Filed November 29th, 1912. Wm. M. Van Dyke, Clerk. [38]

[Judgment.]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern
District of California, Southern Division.*

C. C. No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

This cause having come on regularly for trial on the 27th day of November, 1912, being a day in the July Term, A. D. 1912, of the District Court of the United States for the Southern District of California, Southern Division, before the Court and a jury of twelve (12) men duly impaneled; Burt Chellis, Esq., and J. W. Swanwick, Esq., appearing as counsel for plaintiff, and Pennel Cherrington, Esq., appearing as counsel for defendant, and the trial having been proceeded with on the 27th and 29th days of November, A. D. 1912, and witnesses having been sworn and examined and documentary evidence having been produced on behalf of the respective parties, and the evidence having been closed, and the cause, after argument by the respective parties and the instructions of the Court, having, on said 29th day of November, 1912, been submitted to the jury, and the jury, on said 29th day of November, 1912, having rendered the following Verdict:

“In the District Court of the United States, for the Southern District of California, Southern Division.

C. C. No. 1636.

MARTINI DIVIDI,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE
RAILROAD COMPANY,

Defendant.

We, the jury in the above-entitled cause, find in favor of the plaintiff in the [39] sum of \$2750.00.
Los Angeles, November 29, 1912.

A. G. BARTLETT,
Foreman.”

And the Court having ordered that Judgment be entered herein in accordance with said verdict in favor of the plaintiff and against the defendant in the sum of Two Thousand Seven Hundred and Fifty Dollars (\$2750.00);

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Martini Davide, plaintiff herein, have and recover of and from the San Pedro, Los Angeles and Salt Lake Railroad Company, defendant herein, the sum of Two Thousand Seven Hundred and Fifty Dollars (\$2750.00), together with his,

said plaintiff's, costs and disbursements in this behalf taxed at \$72.10.

JUDGMENT entered November 29th, 1912.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: C. C. No. 1636. United States District Court, Southern District of California, Southern Division, Martini Davide, Plaintiff, vs. San Pedro, Los Angeles and Salt Lake Railroad Company, a Corporation, Defendant. Copy of Judgment. Filed Nov. 29, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [40]

Certificate of Clerk U. S. District Court to Judgment-roll, etc.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

C. C. No. 1636:

MAFTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO. LOS ANGELES AND SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States, for the Southern District of California, do hereby certify the foregoing to be a

true copy of the Judgment entered in the above-entitled action and recorded in Judgment Book No. 2 of said court for the Southern Division, at page 180 thereof, and I further certify that the foregoing papers hereto annexed, constitute the judgment-roll in said action.

Attest my hand and the seal of said District Court, this 29th day of November, A. D. 1912.

[Seal]

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: C. C. No. 1636. In the District Court of the United States for the Southern District of California, Southern Division. Martini Davide vs. San Pedro, Los Angeles & Salt Lake Railroad Company. Judgment-roll. Filed November 29th, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Recorded Judgment Register, Book No. 1, Page 180. [41]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Stipulation [That Answer to Complaint Stand as Answer to Second and Last Amended Complaint, etc.].

It is hereby stipulated that the defendant's answer to the original complaint in the above-entitled action may stand as its answer to the plaintiff's second and last amended complaint, and that any new matter in said second and last amended complaint be deemed denied.

Dated November 29th, 1912.

BURT CHELLIS,
CHAS. E. DONNELLY, Jr.,
HARRIS & SWANWICK,
Attorneys for Plaintiff.

[Endorsed]: Original. C. C. No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., Defendant. Stipulation. Filed Feb. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [42]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

This cause coming on regularly for trial on the 27th day of November, 1912, before the Honorable OLIN WELLBORN, Judge of the above-named court, and a jury duly impaneled and sworn, Mr. Burt Chellis and Mr. Charles E. *Donley* appearing for the plaintiff, and Pennel Cherrington appearing for the defendant, the following proceedings were had and testimony taken:

**[Testimony of Martini Davide, the Plaintiff, in His
Own Behalf.]**

MARTINI DAVIDE, the plaintiff, being first duly sworn, testified on his own behalf as follows:

I live at 703 San Fernando Street, Lost Angeles. It is 19 months since I have done any work; that is, since I lost my hand. When I lost my hand I was working for the Salt Lake road ballasting the track of the main line in Nevada, about 8 miles from Caliente. There were 50 or 60 other men working with me in the gang. On that night I think we quit work before 5 o'clock and were returning to camp on

(Testimony of Martini Davide.)

hand-cars. There were 7 cars; I was on the third car from the front with 5 or 6 other men. The foreman was on the first car, and the second one was loaded with Mexicans. I think we had gone 5 or 6 miles before the accident happened. We were going along pretty fast; we were pumping pretty fast, and we hit another car in front of us, and the jerk tore me off the car, and I fell on the [43] side; the car jumped the track and crushed my hand. I was standing with my back to the other car, the car in front of me. I didn't see it before we bumped into it. No one warned me of any collision. I was taken to Caliente and my hand was cut off by the company's surgeon. After that I came to Los Angeles, because I had been here before the accident. I was taken to the hospital where I stayed 39 days. At the time I left the hospital my arm was not well; it still hurt me; it always hurts me. The boss sent me on that hand-car to drive it back to camp. Since then I have not been able to work. The accident happened on the 23d day of April, 1911.

[Testimony of Antonio Medrano, for Plaintiff.]

ANTONIO MEDRANO, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

I am acquainted with the plaintiff, and first met him about two weeks before he was hurt. We had been working together a couple of days before the accident. I saw the accident. In coming back to the camp that night, we had 6 or 7 hand-cars. I was on the second hand-car facing towards the following

(Testimony of Antonio Medrano.)

car on which the plaintiff was, that is, the third car. He had his back towards me. Just before the accident some of the cars were going slow and some were not. There were some that had enough force to go, they were traveling fast. The car I was on was running quite fast a short time before the accident. When we were coming into the tunnel we were coming fast, about halfway in the tunnel, but when we came out of the tunnel we were not coming very fast. The collision took place outside of the tunnel.

Q. How was the speed of the car at the time of the accident compared with the speed a short time before the accident—the car that he was on?

The INTERPRETER.—You are referring to his car?

Mr. CHELLIS.—His car. [44]

A. I am not able to say.

Q. Well, was it faster or slower?

A. Their car was—were traveling faster than mine—if that is what you refer to. That is what he says.

Q. No, it is not; I want to find out whether his car slowed down at the time of the accident, slower than it was going before that or whether it went faster, if we can find out. I don't know just how to do it with this witness.

The COURT.—Well, that is a question that should elicit an answer. Did it slow down or did it accelerate its speed at the time of the accident? Is that what you want to know?

The INTERPRETER.—If you will always put

(Testimony of Antonio Medrano.)

your questions in the first person.

Mr. CHELLIS.—All right.

Q. Did your car slow down or increase its speed at the time of the accident?

A. It was going slow.

My car was traveling slow at the time of the accident. I saw Davide at the time of the accident, when he fell. When we came out of the tunnel we were traveling very slow because we could not go fast on account we didn't have enough power, and when we got about eleven meters out of the tunnel, the other car came and hit us and knocked our hand-car about 11 meters ahead; then the fourth car came and collided with the third. There were two collisions; it was the collision of the fourth car with the third that threw Davide off. I saw Davide fall.

At this point the defendant admitted that the plaintiff's hand was injured by the collision so that it had to be amputated. It was also here admitted that the plaintiff was riding with his back towards the car preceding it.

On cross-examination the witness testified: Eleven meters would be about 55 feet. We were riding on a hand-car which was [45] propelled by no other kind of power than the physical hand-power of the men on the car.

[Testimony of Ricardo Reyes, for Plaintiff.]

RICARDO REYES, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

I was working with Davidi at the time of the accident, and had been for about ten days. I was on the

(Testimony of Ricardo Reyes.)

second car and was facing the rear. Davidi was on the following car and had his shoulder towards us. At the time of the accident our car was running slow; as we came out of the tunnel we were tired and were traveling slow. I didn't see Davidi's car while we were in the tunnel, but saw it outside. When I first saw it, it was about thirty feet from our car, but I can't say exactly how far it was. When we were coming out of the tunnel their hand-car came in collision with ours, then, as ours went ahead, the one following Davidi's car came and hit his car, and that was the time he fell. It was the fourth car that struck his and caused him to fall.

Plaintiff here rests.

Mr. CHERRINGTON.—The defendant moves the Court to grant a motion for a nonsuit, on the ground of insufficiency of the evidence to support any verdict, taking the pleadings in any light, either the amended complaint, or as lastly amended.

Which said motion was overruled by the Court, and an exception taken by the defendant to such ruling.

Defendant's Testimony.

[Testimony of Hugh O'Brien, for Defendant.]

HUGH O'BRIEN, a witness called on behalf of defendant, being first duly sworn, testified as follows:

At the time of plaintiff's injury, I was foreman of the gang [46] he was working in. I had about eighty men. Used seven or eight cars, sometimes nine, in transferring the men back and forth. The accident occurred at the east switch at Stine, which is a station in Nevada, and about 500 feet east of the

(Testimony of Hugh O'Brien.)

west switch—that would be this side of Stine; that is, the men would have gone by the switch about 500 feet on their way to Caliente. I don't know what car the plaintiff was on. I was on the front car; I always ride on the front car in order to protect the men behind me against trains that might be coming in the opposite direction. I always instructed the men to run the cars not closer than 300 feet. Before the accident I directed the men where to put the cars on the track, but at the time of the accident I don't know what the men on the cars behind me were doing. According to my best judgment, I think the west switch at Stine was from 800 to 1,000 feet from the tunnel that has been testified about, though I don't know the exact distance. I think likely the accident happened about 1,500 feet from the tunnel.

Mr. CHERRINGTON.—I now desire to read in evidence a deposition of Steve Bonich, taken pursuant to stipulation.

The COURT.—Just read it.

[Deposition of Dan Zupon, for Defendant.]

DAN ZUPON, a witness called on behalf of defendant, being first duly sworn, testified as follows, by deposition:

I know Martini Davide. On the 25th of April, 1911, he was working with me near Stine station in Nevada, for the San Pedro, Los Angeles & Salt Lake Railroad Company. We were working about ten miles west of Caliente. We had about 100 men in the gang. I remember the accident in which Martini Davide had his hand cut off. It was in the evening.

(Deposition of Dan Zupon.)

We were engaged on that day ballasting the track. We were on our way home after quitting work for the day. We were going home on hand-cars. I was riding on the fifth hand-car from the front, and Davide was also on the fifth [47] car. The fourth and fifth cars were running about four feet apart, and then came as close as they could get. The foreman was on the front car; he was between 14 and 15 rails ahead of us; a rail is 33 feet. The foreman had nothing to do with the running of the car I was on. When Davide got hurt he was riding on the handle; then he was playing with the Mexican on the fourth car without holding on to anything. The cars were going as fast as they could pump, between nine and ten miles an hour. Davide fell because he was not holding on to the handle of the hand-car, and he was joshing with the Mexican on the car in front, and the Mexican started to run faster, then Davide fell between the cars. We stopped the hand-car in about a minute; it ran about a rail and a quarter. There were five men on my hand-car.

[Deposition of Steve Bonich, for Defendant.]

STEVE BONICH, a witness called on behalf of defendant, being first duly sworn, testified as follows by deposition:

I have known Martini Davide about two months before the 25th of April, 1911, and was working with him ballasting track that day. We were working about thirty miles west of Caliente. There were from 95 to 100 men in the gang. I remember Davide getting hurt; he was on the way home; it was after

(Deposition of Steve Bonich.)

six o'clock when we quit work. Davide was on the same car I was on. There were seven cars and we were riding on the fifth from the front. At the time Davide was hurt the fourth and fifth cars were together, and Davide put his hand around to the Mexican, and was joshing with the Mexican, tickling him, playing with him. When the hand-cars got together Davide put one leg on the fourth hand-car and one on his own car, but didn't hold on to anything. The Mexican whom he tickled was on the fourth car, that is, the car in front of us. The cars were going like when they go between [48] six and seven miles an hour. Davide fell off the car. It was the fifth car that ran over him and cut his hand off. We stopped the car within a half rail. There were five men on our car. The foreman was riding on the first car.

Defendant rests.

Rebuttal Testimony.

**[Testimony of Antonio Medrano, for Plaintiff
(Recalled in Rebuttal).]**

ANTONIO MEDRANO, recalled on rebuttal, testified as follows:

At no time, except at the time of the collision, were the car that I was on and the car that Davide was on near enough for a man to stand with one foot on each car, and Davide did not do that.

**[Testimony of Ricardo Reyes, for Plaintiff
(Recalled in Rebuttal).]**

RICARDO REYES, recalled on rebuttal, testified as follows:

Except at the time of the collision, the cars were not close enough for Davide to stand with one foot on each car. He was standing on his own car and at no time stood with a foot on both. At no time was Davide playing with or tickling a Mexican on our car. I don't remember Dan Zupon or Steve Bonich. I don't mean to say, however, that they were not working with my gang.

**[Testimony of Martini Davide, the Plaintiff, in His
Own Behalf (Recalled in Rebuttal).]**

MARTINI DAVIDI, recalled on rebuttal, testified as follows:

I don't know Steve Bonich; I didn't have time to know anybody; I was there only twelve days. I didn't know Dan Zupon either. I didn't know the names of the men on the car with me because they were all Austrians. I never stood with one foot on one car and one on the other. At the time of the accident I was not playing with a Mexican or anybody else on the other car. I don't mean to say that Zupon and Bonich were not working with me that day. All I know is that I knew one Mexican that had two fingers off. [49]

Thereupon counsel for the defendant requested the Court, in writing, to give to the jury the following instructions:

Defendant's Requests for Instructions.

(Title of Court and Cause.)

Exception No. 1.

The defendant requests the Court to instruct the jury to return a verdict in favor of the defendant, for the reason that the evidence is insufficient to support a verdict in favor of the plaintiff, no evidence of negligence on the part of the defendant having been shown.

Which said instruction the Court refused to find, and to the refusal of the Court to find the same, the defendant duly excepted.

Exception No. 2.

Defendant also requests the Court to instruct the jury to find a verdict in favor of the defendant on the further ground that at the time of the accident in question, neither the defendant nor the plaintiff were engaged in interstate commerce.

Which said instruction the Court refused to find, and to the refusal of the Court to find the same, the defendant duly excepted.

Exception No. 3.

The fact that the hand-cars came in collision and the plaintiff Davide was injured thereby raises no presumption whatever that the defendant or its employees were negligent.

Which said instruction the Court refused to find, and to the refusal of the Court to find the same, the defendant duly excepted.

Exception No. 4.

Before you find a verdict for the plaintiff, you must believe from the greater weight of the evidence introduced that the defendant [50] was guilty of the negligence set up by the plaintiff, so that if you find that the greater weight of the evidence is in favor of the defendant, or if it is equally balanced, your verdict must be for the defendant, and in this connection you are instructed that the occurrence of the collision is of itself no evidence of such or any negligence whatever.

Which said instruction the Court refused to find, and to the refusal of the Court to find the same, the defendant duly excepted.

Whereupon the Court gave to the jury the following instructions:

Instructions of the Court to the Jury.

Gentlemen of the Jury: I will now read you the instructions of the Court.

The plaintiff sues to recover damages, laid in the complaint at ten thousand dollars, for personal injuries to himself, which he alleges were caused by defendant's negligence.

The plaintiff's complaint, after alleging defendant's corporate existence and its ownership and operation of a railroad between the States of California and Utah, and plaintiff's employment by defendant in the capacity of a section-hand, engaged in repairing the main line of track of defendant between Las Vegas and Caliente in the State of Nevada, proceeds as follows:

“That upon the 25th day of April, 1911, plaintiff was, and for a period of several days prior thereto had been regularly employed by the defendant in the capacity of a section-hand, and was engaged in repairing the said main line track of defendant between the stations of Las Vegas and Caliente in the State of Nevada.

“That upon said last mentioned date, and while plaintiff was so employed and engaged, as aforesaid, plaintiff was riding upon and assisting in propelling a certain hand-car between said stations of Las Vegas and Caliente, at a point nine miles west of [51] Caliente, in said State of Nevada; that said hand-car at said time was owned, operated and used by defendant in connection with the work in which plaintiff was engaged, as aforesaid; that plaintiff in riding upon and assisting in propelling said hand-car, as aforesaid, was acting under and in accordance with the orders and direction of a section foreman; that said section foreman at said time was regularly employed by defendant as such section foreman in connection with said work upon defendant’s said main line track.

“That upon said 25th day of April, 1911, and while plaintiff was so employed and engaged, as aforesaid, and while said plaintiff was riding upon and assisting in propelling said hand-car between said stations of Las Vegas and Caliente, as aforesaid, another and different hand-car, which said last mentioned hand-car was also at said time owned, operated and used by defendant in the care of and in

making repairs to its said main line track, was being at said time propelled by defendant at a high rate of speed upon and along said main line of track in advance of and in front of the said hand-car upon which plaintiff was riding, as aforesaid; that said other hand-car, so operated at a high rate of speed, as aforesaid, passed along said main line track in advance of and ahead of the said hand-car upon which plaintiff was riding, as aforesaid, that while said other hand-car was being so propelled and operated at a high rate of speed along the said main line track of defendant ahead of and in advance of the said car upon which plaintiff was riding, as aforesaid, the speed of said other hand-car, which was so being operated in advance of the said car upon which plaintiff was riding, as aforesaid, was suddenly materially slackened and lessened; that plaintiff had no means of knowing at any of said times hereinbefore mentioned, and at none of said times did he know that the speed of said other hand-car which had so advanced along said main line track [52] in front of and in advance of the said hand-car upon which plaintiff was riding, as aforesaid, would be or had been materially or at all slackened or lessened, as aforesaid. That shortly after the slackening and lessening of the speed of said other hand-car, as aforesaid, and because thereof, the said hand-car upon which plaintiff was riding as aforesaid, ran against and with great force and violence struck the said other hand-car which had so advanced along said main track in advance of the said hand-car upon which plaintiff was riding, as aforesaid,

“That shortly thereafter another and different hand-car which was then and there owned, operated and controlled by defendant upon said main line of track ran into and collided with the said hand-car upon which plaintiff was riding, as aforesaid.

“That the shock and collision of said hand-cars was such that plaintiff, by reason of said shock and collision, was violently thrown from the hand-car upon which he was riding, as aforesaid, and fell upon the track of defendant in front of said last mentioned hand-car; that the wheels of said last mentioned hand-car, upon which plaintiff had been riding, as aforesaid, ran over and mangled the left hand of plaintiff; that the employees of defendant who were propelling the said other hand-car which had so advanced along said main line track ahead of and in front of the car on which plaintiff was riding, and the employees of defendant who were propelling the said hand-car which ran into and collided with the hand-car upon which plaintiff was riding, as aforesaid, operated the said respective hand-cars in a careless and negligent manner, in so suddenly materially slackening and lessening the speed of said hand-car, as hereinbefore alleged, and in running into and colliding with the hand-car upon which plaintiff was riding, as aforesaid, respectively.

“Said accident was not caused by any fault or negligence on the part of said plaintiff but was caused by the negligence of said defendant and its employees as hereinbefore set forth; that when [53] plaintiff was injured, as aforesaid, he was engaged in work required of him by said defendant.”

The answer admits defendant's corporate existence, its ownership and operation of the railroad and its employment of plaintiff but denies all the other allegations of the complaint.

Said answer also set up as a further and separate defense that plaintiff's injuries were caused by, "and the result of, the negligence, carelessness and recklessness of the plaintiff himself in jumping from one of the hand-cars mentioned in said complaint to the other while the same were in motion, and defendant avers that while plaintiff was so engaged he fell between the said hand-cars and was then and there injured, without any negligence whatever on the part of this defendant or any of its employees."

Said answer further avers, "that the plaintiff was playfully jumping from one of the hand-cars mentioned in said complaint to the other while said hand-cars were in motion, and defendant avers that whatever injury the plaintiff suffered was the result of a risk which the plaintiff assumed, and was not the result of any negligence on the part of defendant or any of its employees."

Said answer further avers that plaintiff, at the time of the accident, was not engaged in any act of interstate commerce and was not performing any act for which he was employed by this defendant, "but was engaged in play of his own accord and for his own amusement, and while so engaged in such play was jumping from one hand-car to another and fell between the same and so was injured, without any fault or negligence on the part of this defendant or any or either of its employees."

The first issue to which the Court directs your attention is, was the defendant negligent?

In order to recover under the pleadings in this case, plaintiff must show that the defendant's employees were negligent as charged in the complaint, and, that such negligence was a proximate [54] cause of plaintiff's injuries.

If none of said employees were negligent, or if any of them were negligent but such negligence was not a proximate cause of plaintiff's injuries, no recovery can be had.

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent man would not do. It is not intrinsic or absolute, but always relates to some circumstance of time, place or person.

On this issue the Court instructs you that the mere happening of the accident raises no presumption that the defendant corporation was negligent, but the burden of proving negligence, by a preponderance of evidence, is upon the plaintiff, and the negligence, if any is proven, must be that alleged in the complaint, and, unless such negligence is so proven, your verdict must be for the defendant.

The Court further charges you, that contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care as, concurring and co-operating with the negligent act or acts of the defendant, was a proximate cause of the injury complained of by the plaintiff.

An act is the proximate cause of any event which, in the natural order of things and under the circumstances, it would necessarily produce that event, when it is the first and direct power producing the result.

The Court further charges you that section 1 of an act of Congress, passed April 22, 1908, provides, among other things that every common carrier by railroad, while engaged in commerce between any of the several States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of [55] such carrier, or by reason of any defect of inefficiency due to its negligence in its appliances, machinery, track, road-bed, works or other equipment.

It is admitted in this case that at the time of the accident complained of the defendant Salt Lake Railroad Company was a common carrier by railroad, engaging in commerce between several States, and the Court charges you that upon the admitted facts of the case the plaintiff was employed by such carrier in such commerce.

If the evidence fails to satisfy you that any of defendant's employees were negligent as charged in the complaint, or if you believe from the evidence that either of them was negligent, but the evidence fails to satisfy you that such negligence was a proximate cause of plaintiff's injuries, your verdict will be for the defendant.

If, however, you believe from the evidence that any of defendant's employees were negligent, as

alleged in the complaint, and that such negligence was a proximate cause of plaintiff's injuries, your verdict will be for the plaintiff.

If you find for plaintiff, it will be your duty to assess the amount of damages he is entitled to recover, and in estimating those damages you may consider that the nature and extent to which the injuries he received are permanent in their nature and will affect his health and physical condition in the future, and also his bodily pain and suffering, if any, which has or will proximately, that is naturally, and without the intervention of some other cause, result from any injury received by him as charged in the complaint, and allow him such damages, not exceeding the amount alleged in the complaint, as, in your opinion, will fairly compensate him for all the pain and injury, if any, which he has sustained or will sustain by reason of said injuries. [56]

The Court further charges you, however, that if you find for the plaintiff, but also find that he was guilty of contributory negligence, you will diminish the damages you find the plaintiff has sustained by reason of his injuries in proportion to the amount of negligence attributable to the plaintiff.

And the Court gave to the jury no further or other instructions.

Exception No. 5.

“An act is the proximate cause of an event when, in the natural order of things and under the circumstances, it would necessarily produce that event, when it is the first and direct power producing the result.”

To which instruction the defendant then and there excepted.

Exception No. 6.

The defendant then and there excepted to that part of the instruction of the Court, which was as follows:

“And the Court charges you that, upon the admitted facts of the case, the plaintiff was employed by such carrier in such commerce.”

Exception No. 7.

“If, however, you believe from the evidence that any of defendant’s employees were negligent as alleged in the complaint, and that such negligence was a proximate cause of plaintiff’s injuries, your verdict will be for the plaintiff.”

To which instruction the defendant then and there excepted.

Exception No. 8.

“The Court further charges you, however, that, if you find [57] for the plaintiff, but also find that he was guilty of contributory negligence, you will diminish the damages which you find the plaintiff has sustained by reason of his injuries in proportion to the amount of negligence attributable to the plaintiff.”

To which instruction the defendant then and there excepted.

And thereupon the jury returned a verdict in favor of the plaintiff, in words and figures as follows:

(Title of court and cause omitted.)

“We, the jury in the above-entitled cause, find in favor of the plaintiff in the sum of \$2750.00.

Los Angeles, November 29, 1912.

A. G. BARTLETT,

Foreman.”

The foregoing, containing all the evidence offered at the trial in said cause, all of the defendant's requests for instructions to the jury, together with the defendant's exceptions to the Court's refusal to give said instructions, and the instructions of the Court to the jury, with the defendant's exceptions thereto, and containing all of the proceedings on the trial of said cause, to and including the verdict of the jury, is hereby offered as the defendant's proposed Bill of Exceptions.

A. S. HALSTED and

PENNEL CHERRINGTON,

Attorneys for Defendant.

Service of the foregoing Bill of Exceptions accepted, and a copy thereof received, this 24th day of December, 1912.

BURT CHELLIS,

HARRIS & SWANWICK,

Attorneys for Plaintiff. [58]

It is hereby stipulated that the foregoing Bill of Exceptions is a true and correct Bill of Exceptions, and that the same may be settled and allowed by the Court.

Dated, this 30th day of December, 1912.

BURT CHELLIS,

HARRIS & SWANWICK,

Attorneys for Plaintiff.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing Bill of Exceptions, containing all of the evidence offered and introduced at the trial of said cause, together with the defendant's requests for instructions to the jury and the defendant's exceptions to the Court's refusal to give said instructions, and the instructions of the Court to the Jury, together with the defendant's exceptions to said instructions, and containing all of the proceedings in said cause, to and including the verdict of the jury, is a true and correct Bill of Exceptions, and is hereby settled and allowed, and ordered to be filed.

Dated this 30th day of Dec. 1912.

OLIN WELLBORN,

Judge.

[Endorsed]: Original. No. 1636. U. S. District Court Ninth District Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Bill of Exceptions. Filed Dec. 30, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. A. S. Halsted, Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitors for Defendant. [59]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Petition for a Writ of Error and Supersedeas.

San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 29th day of November, 1912, comes now by Pennel Cherrington, its attorney, and files herewith an assignment of error, and petitions said Court for an order allowing said defendant to procure a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the termination of said writ of error by the said United

States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated February 15th, 1913.

PENNEL CHERRINGTON,
Attorney for Petitioner.

[Endorsed]: Original. C. C. No. 1636. U. S. District Court, Ninth [60] District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Petition for Writ of Error and Supersedeas. Filed Feb. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within Petition this 15th day of Feb. 1913. Burt Chellis, Chas. E. Donnelly, Jr., Harris & Swanwick, Solicitors for Plff. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [61]

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now the defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, and files the fol-

lowing assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause, petition for which writ of error is filed at the same time with this assignment of error.

I.

That the trial Court erred in overruling and denying the defendant's motion for a nonsuit.

II.

That the trial Court erred in refusing to direct the jury to return a verdict in favor of the defendant as requested by its request for instruction numbered one because of the insufficiency of the evidence to support a verdict in favor of the plaintiff.

III.

That the trial Court erred in refusing to instruct the jury to return a verdict in favor of the defendant on the ground that at the time of the accident in question, neither the defendant nor the plaintiff were engaged in interstate commerce, as requested by defendant in its request for instruction numbered two.

IV.

That the trial Court erred in refusing to instruct the jury that the fact that the hand-cars in question came in collision and the plaintiff Davide was injured thereby, raises no presumption [62] whatever that the defendant or its employees were negligent, as requested by defendant in its request for instruction numbered three.

V.

That the trial Court erred in refusing to instruct

the jury as follows, on request of the defendant in its request for instruction numbered four:

Before you find a verdict for the plaintiff, you must believe from the greater weight of the evidence introduced that the defendant was guilty of the negligence set up by the plaintiff, so that if you find that the greater weight of the evidence is in favor of the defendant, or if it is equally balanced, your verdict must be for the defendant, and in this connection you are instructed that the occurrence of the collision is of itself no evidence of such or any negligence whatever.

VI.

That the trial Court erred in instructing the jury as follows:

An act is the proximate cause of an event when, in the natural order of things and under the circumstances, it would necessarily produce that event, when it is the first and direct power producing the result.

VII.

That the trial Court erred in instructing the jury as follows:

And the Court charges you, that, upon the admitted facts of the case, the plaintiff was employed by such carrier in such commerce.

VIII.

That the trial Court erred in instructing the jury as follows:

If, however, you believe from the evidence that any of defendant's [63] employees were negligent as alleged in the complaint, and, that such neg-

ligence was a proximate cause of plaintiff's injuries, your verdict will be for the plaintiff.

IX.

That the trial Court erred in instructing the jury as follows:

The Court further charges you, however, that, if you find for the plaintiff, but also find that he was guilty of contributory negligence, you will diminish the damages which you find the plaintiff has sustained by reason of his injuries in proportion to the amount of negligence attributable to the plaintiff.

X.

That the trial Court erred in overruling and denying the defendant's motion for a new trial.

PENNEL CHERRINGTON,

Attorney for Defendant.

And upon the foregoing assignment of errors and upon the record in said cause, the defendant prays that said verdict and judgment be reversed.

Dated February 15th, 1913.

PENNEL CHERRINGTON,

Attorney for Defendant.

[Endorsed]: Original. C. C. No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Assignment of Errors. Filed Feb. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within Assignment of Errors this 15th day of Feb. 1913. Burt Chellis, Chas. C. Donnelly, Jr., Harris & Swanwick, Solicitors for Plff. Pennel Cherrington, 502-4 Pacific

Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [64]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Order Staying Proceedings.

The defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, having this day filed its petition for a writ of error from the verdict and judgment made and entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which the defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and said petition having this day been duly allowed:

NOW, THEREFORE, it is ordered that upon said defendant filing with the Clerk of this Court a good and sufficient bond in the sum of Three Thousand Five Hundred Dollars (\$3,500.00), to the effect that

if the said defendant and plaintiff in error shall prosecute the said writ of error with effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the Clerk of this Court, that all further proceedings in this Court be and they are hereby suspended and stayed until the determination of said writ of error by said United [65] States Circuit Court of Appeals.

Dated February 15th, 1913, at Chambers.

OLIN WELLBORN,
Judge.

[Endorsed]: Original. C. C. No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Order Staying Proceedings. Filed Feb. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within order this 15th day of Feb. 1913. Burt Chellis, Chas. C. Donnelly, Jr., Harris & Swanwick, Solicitors for ———. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [66]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error.

Upon motion of Pennel Cherrington, attorney for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be, and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the verdict and judgment heretofore entered herein.

Dated February 15th, 1913, at Chambers.

OLIN WELLBORN,

Judge.

[Endorsed]: Original. C. C. No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Order Allowing Writ of Error. Filed Feb. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within order this 15th day of Feb. 1913. Burt Chellis, Chas. C. Donnelly, Jr., Harris & Swanwick, Solicitors for Plff. Pennel Cherrington, 502-4 Pacific Electric

Bldg., Los Angeles, Cal., Solicitor for Defendant.
[67]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto Martini Davide, the plaintiff above named, in the sum of Three Thousand Five Hundred Dollars (\$3,500.00), to be paid to said Martini Davide, to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our successors and assigns, firmly by these presents.

Sealed with our seals, and dated this 17th day of February, A. D. 1913.

WHEREAS, the above-named defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, has issued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by

the District Court of the United States, Southern District of California, Southern Division, rendered and entered in said cause on the 29th day of November, 1912.

NOW, THEREFORE, the condition of this obligation is such that if the above-named San Pedro, Los Angeles & Salt Lake Railroad Company shall prosecute said writ to effect, and answer all costs and damages if it shall fail to make good its plea, then [68] this obligation shall be void, otherwise to remain in full force and effect.

SAN PEDRO, LOS ANGELES & SALT
LAKE RAILROAD COMPANY,

By H. C. NUTT,

Its General Manager.

NATIONAL SURETY COMPANY.

CHAS. SEYLER, Sr.,

Resident Vice-president.

[Seal]

H. EVERETT CHARLTON,

Resident Assistant Secretary.

General Office for So. California, 264-5-6, I. W.
Hellman Bldg., Los Angeles, California.

CHAS. SEYLER, Jr.,

General Agent. [69]

AFFIDAVIT, ACKNOWLEDGMENT, AND
JUSTIFICATION BY GUARANTEE OR
SURETY COMPANY.

State of California,

County of Los Angeles,—ss.

On this seventeenth day of February, one thousand nine hundred and thirteen, before me personally

came Chas. Seyler, Sr., known to me to be the Resident Vice-president of the National Surety Company, the corporation described in and which executed the within and foregoing bond of San Pedro, Los Angeles and Salt Lake Railroad Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of Los Angeles, State of California; that he is the Resident Vice-president of said company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within bond of San Pedro, Los Angeles and Salt Lake Railroad Company is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Resident Vice-president of said company, and that he is acquainted with H. Everett Charlton and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said H. Everett Charlton subscribed to said Bond is in the genuine handwriting of said H. Everett Charlton, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever by more than the sum of Seven Thousand (\$7,000) 0000 Dollars.

That Frank L. Gilbert is our agent to acknowledge service in the Judicial District wherein this bond is given.

CHAS. SEYLER, Sr.

(Deponent's signature.) [70]

Sworn to, acknowledged before me, and subscribed in my presence this seventeenth day of February, 1913.

[Notarial Seal]

HAZEL JONES,

(Officer's signature, description and seal)

Notary Public in and for the County of Los Angeles,
State of California.

Approved.

OLIN WELLBORN,

Judge.

[Endorsed]: Original. No. 1636. U. S. District Court, Ninth District, Southern District of California, Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Bond. Filed Feb. 17, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [71]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

Clerk's Office.

C. C. No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY.

Praeceptum [for Transcript of Record].

To the Clerk of said Court:

Sir: Please issue a certified copy of the Record in the above-entitled case, consisting of:

The judgment-roll;

Stipulation that defendant's answer stand as answer to amended complaint:

Bill of exceptions;

Petition for writ of error;

Assignment of errors;

Order staying proceedings;

Order allowing writ of error; and

Bond on writ of error.

said record to be certified under the hand of the clerk and the seal of the Court.

PENNEL CHERRINGTON,

Attorney for Defendant.

[Endorsed]: C. C. No. 1636. U. S. District Court, Southern District of California, Southern Division. Martini Davide, Plaintiff, vs. San Pedro, Los An-

geles & Salt Lake Railroad Company, Defendant.
Praecipe for Certified Copy of Record. Filed Mar.
26, 1913. Wm. M. Van Dyke, Clerk. By Chas. N.
Williams, Deputy Clerk. [72]

**[Certificate of Clerk U. S. District Court to Tran-
script of Record.]**

*In the District Court of the United States of Amer-
ica, in and for the Southern District of Califor-
nia, Southern Division.*

C. C. No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court
of the United States of America, in and for the
Southern District of California, do hereby certify
the foregoing Seventy-two typewritten pages, num-
bered from 1 to 72, inclusive, and comprised in one
(1) volume, to be a full, true and correct copy of the
pleadings and of all papers and proceedings upon
which the judgment was made and entered in said
cause and also of the Judgment, Bill of Exceptions,
Petition for Writ of Error, Assignment of Errors,
Order Staying Proceedings, Order Allowing Writ of
Error, and Bond on Writ of Error, in the above and
therein entitled cause, and that the same together
constitute the record in said cause as specified in the

praecipe filed in [73] my office on behalf of the defendant by its attorneys of record.

I do further certify that the cost of the foregoing record is \$33.55, the amount whereof has been paid me by the San Pedro, Los Angeles and Salt Lake Railroad Company, a corporation, the defendant in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 2d day of April, in the year of our Lord one thousand nine hundred and thirteen and of our Independence the one hundred and thirty-seventh.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [74]

[Endorsed]: No. 2266. United States Circuit Court of Appeals for the Ninth Circuit. San Pedro, Los Angeles & Salt Lake Railroad Company, a Corporation, Plaintiff in Error, vs. Martini Davide, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed April 11, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

**[Order Allowing Thirty Days' Additional Time in
Which to File and Docket Transcript.]**

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Good cause appearing therefor, it is hereby ordered: That the defendant above named may have thirty days' time in addition to that allowed by law and the rules of the Court, in which to file and docket its transcript on appeal in the United States Circuit Court of Appeals.

Dated March 11th, 1913.

OLIN WELLBORN,

United States District Judge for the Southern District of California, Southern Division.

[Endorsed]: Original. No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Order Extending Time. Received copy of the within order this 11 day of March, 1913. Harris & Swanwick, Burt Chellis, C. E. Donnelly, Jr., Solicitors for ———.

No. 2266. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time Thirty Days to File Record Thereof and to Docket Case. Filed Mar. 12, 1913. F. D. Monckton, Clerk. Re-filed Apr. 11, 1913. F. D. Monckton, Clerk.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

San Pedro, Los Angeles & Salt
Lake Railroad Company, a cor-
poration,

Plaintiff in Error,

v.

Martini Davide,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This action was brought by the defendant in error, plaintiff below, hereinafter styled plaintiff, to recover from the plaintiff in error, defendant below, hereinafter styled defendant, the sum of \$10,000.00, for the loss of his left hand resulting from an injury sustained as hereinafter set forth.

On the 25th day of April, 1911, the plaintiff was employed by the defendant in ballasting the track of the main line of defendant between the stations of Las

Vegas and Caliente, in the state of Nevada, the latter station being east of the former. There were about eighty men employed on this work with the plaintiff. On the day in question the men quit work about five o'clock in the evening, and were proceeding easterly to their camp on hand cars, of which there were seven or eight. The plaintiff with five or six other men was riding on the third car from the front, and with his back to the car ahead of him. The cars were going at a speed of from nine to ten miles an hour. When the car on which plaintiff was riding was about thirty feet from that ahead of it, the forward car slowed down, as the men on it were tired out and could not go any faster, the only power used being that of hand power, by which the cars were being pumped along. When the car preceding it slowed down, the car on which plaintiff was riding collided with it, the result being that the car immediately behind the car on which plaintiff was riding collided with it, throwing plaintiff off in front of the car on which he had been riding, which fell over his left wrist and injured it to such an extent that the left hand had to be amputated.

The plaintiff's cause of action is founded upon the Federal Employers' Liability Act of April 22nd, 1908, as amended April 5th, 1910. U. S. Compiled Statutes 1901, Supplement for 1911, page 1322.

The plaintiff alleged in his second amended complaint that the defendant at the time of his injuries was engaged in commerce as a common carrier between the states of California and Utah, and through the state of Nevada; that at the time of his accident he was em-

ployed as a section hand, engaged in repairing the main line track of the defendant in the state of Nevada; that at the time of his injuries he was riding upon and assisting in propelling a hand car, which was owned, operated and used by the defendant in connection with the work on which plaintiff was engaged; that while so engaged in riding upon and assisting in propelling said hand car between Las Vegas and Caliente, in the state of Nevada, the car in front of that on which plaintiff was riding, which was also owned, operated and used by defendant in repairing of its main line, was being propelled at a high rate of speed in advance of that on which plaintiff was riding, the speed of which forward car was suddenly materially slackened, a fact of which the plaintiff had no knowledge at the time, by reason whereof the car on which plaintiff was riding collided with great force against the forward car, and therefore, another car coming from behind collided with the rear of the car on which plaintiff was riding, throwing him to the ground, because of which the car on which plaintiff had been riding ran over and mangled his left hand. The negligence upon which plaintiff relied in his second amended complaint was that of the employees of defendant propelling the car in front of the one on which plaintiff was riding, suddenly slowing it down, and that of the employees of defendant who were following the car on which plaintiff was riding. It was alleged that the crews of both cars operated them in a careless and negligent manner, in slackening the speed of the one and in permitting the other to collide with the car on which the plaintiff was riding. The foregoing, though briefly stated, is the substance of the complaint.

The defendant's answer consists of a specific denial of all the allegations of the complaint other than that of its corporate existence, and especially denies that the car on which the plaintiff was riding was being used and operated, or used or operated, in connection with the care or maintenance of its main line of track, and further specially denies that the plaintiff, when injured, was engaged in work required of him by defendant. Affirmatively the answer alleges that the plaintiff's injuries resulted from his own contributory negligence. The defendant also plead affirmatively that whatever injury the plaintiff suffered was one of the risks which he assumed in the course of his employment.

In the fourth paragraph of its answer the defendant alleges that at the time of his injuries plaintiff was not employed or engaged in any act of interstate commerce, and further alleges that at said time neither the plaintiff nor defendant were engaged in interstate commerce, but that the plaintiff was riding upon a hand car between Las Vegas and Caliente, in the state of Nevada; that neither that hand car nor the others being used at the same time and place were engaged in carrying interstate commerce, nor in doing any act of interstate commerce, but were employed in the state of Nevada only, and that plaintiff at such time was not engaged in any act of commerce at all, either interstate or intrastate.

The answer further contains certain allegations to the effect that plaintiff was engaged in play as he was riding upon the hand car, in jumping from one car to another, by reason whereof he fell between the cars, but it is not necessary to go into those allegations here,

inasmuch as the evidence concerning the same was conflicting and the verdict of the jury against the defendant is decisive on that question.

Shorn of technical phraseology and unnecessary matter, the foregoing constitutes a full and fair statement of the issues on which the case was tried.

The facts stated in the second paragraph hereof contain the substance of plaintiff's evidence, stated most favorably to him. It is therefore deemed unnecessary to burden the record and take up the court's time with a further repetition of them. The defendant's evidence conflicted therewith, but as nothing is claimed for it on this appeal, it is omitted herefrom.

At the close of the plaintiff's case the defendant moved the court for a judgment of non-suit on the ground of the insufficiency of the evidence to support any judgment against it, which motion was by the court denied. At the conclusion of the evidence, and before the court instructed the jury, the defendant requested the court to direct a verdict in defendant's favor, on the ground of the insufficiency of the evidence to show any negligence on its part, which request was refused by the court. The defendant also separately requested the court to instruct the jury to find a verdict in its favor on the ground that at the time of the accident neither the plaintiff nor defendant was engaged in any act of interstate commerce, which request was refused by the court. Thereafter, after having been instructed as to the law of the case by the court, the jury returned a verdict in favor of the plaintiff in the sum of \$2,750.00.

It will thus be seen that but two questions are involved in this appeal:

1. Did the evidence show any negligence on the part of the defendant, and,
2. Were the plaintiff and defendant engaged in any act of interstate commerce at the time of the accident?

II.

Assignments of Error by Plaintiff in Error.

1. The court erred in overruling the defendant's motion for a judgment of non-suit.
2. The court erred in refusing to instruct the jury to return a verdict in favor of the defendant because of the insufficiency of the evidence to show negligence on the part of the defendant, as set forth in exception No. 1 of the bill of exceptions.
3. The court erred in refusing to instruct the jury to find a verdict in favor of the defendant on the ground that neither the plaintiff nor defendant, at the time of the accident, was engaged in interstate commerce, as set forth in exception No. 2 of the bill of exceptions.

III.

ARGUMENT.

FIRST.

The plaintiff in error contends that the court erred in denying its motion for a non-suit, and again erred in refusing to instruct the jury to return a verdict in its favor on the ground of the insufficiency of the evidence to show any negligence on the part of the defendant below. [Trans. pp. 44 and 49.] Both involve the

same question, both are based on the same facts, and the same law is applicable to them.

It must be borne in mind that the negligence complained of was that of slowing down of the car in front of plaintiff and permitting the one behind him to collide with the car on which he was riding. [Trans. p. 31.] The evidence is that as the forward car came through a tunnel, it was running quite fast, but as it came out it slowed down. [Trans. p. 42.] It slowed down as it came out of the tunnel because the men were tired out. As the witness Medrano put it—"We didn't have enough power," the only power being hand power. [Trans. p. 43.]

Again, according to the witness Reyes, the forward car was running slow because when it came out of the tunnel the men were tired, and when it came out of the tunnel it was only thirty feet ahead of the plaintiff's car. [Trans. p. 44.] Plaintiff himself simply testified that the accident happened, and as to the result, but did not know any of the details. [Trans. p. 41.]

This, in effect, was all the evidence in the case, except that on the part of the defendant, for which nothing is claimed on this appeal.

The question arises: Does this evidence show that the things alleged by the plaintiff, and the things that happened, constitute negligence on the part of the defendant? It is elementary that the plaintiff must recover upon the allegations of his complaint, that he must recover because of the negligence alleged by him. No claim is made of any other negligence, and if any such claim were made it could avail plaintiff nothing.

We submit that it is not shown that plaintiff's injury was the result of negligence, but must be considered as an accident.

Plaintiff must introduce specific testimony fairly tending to show negligence of the defendant.

Labatt's Master and Servant, Second Ed., Section 1602.

And this principle is controlling, even in cases where the circumstances of the accident strongly suggest the conclusion that defendant has been negligent (as they certainly do not in the case at bar).

Ibid., sec. 1600.

Where the plaintiff's evidence is equally consistent with the absence of negligence as with its existence, no action can be maintained.

Ibid., sec. 1602.

"If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court."

Herbert v. So. Pac. Co., 121 Cal. 229.

"When the negligence of the defendant is the basis of the plaintiff's right of recovery, it is the province of the judge to determine whether the evidence submitted by the plaintiff has any legal tendency to establish negligence, and it is for the jury to determine whether it is sufficient therefor. *If there is no evidence from which a jury would have the right to infer negligence, the judge may withdraw the case from them.*" (Italics are ours.)

McCurrie v. So. Pac. Co., 122 Cal. 558.

Such is the law concerning recoveries in such cases in the state of California, and in the absence of evidence to the contrary, this is presumed to be the law in the state where the accident happened.

16 Cyc., p. 1084;

Harrington v. Union Trust Co., 140 Cal. 244.

As a matter of fact, however, it can be confidently asserted that there is no decision in the state of Nevada contradictory to the principle expressed in the California decisions. Therefore, the California decisions, in the absence of prior decisions by the federal courts to the contrary, would be binding upon the federal courts.

Fed. Stats. Ann., Vol. 4, p. 517, sec. 721.

However, the principles asserted by the California Supreme Court and the federal courts are harmonious.

In C. & N. W. Ry. v. O'Brien, 132 Fed. Rep. 593, the Circuit Court of Appeals for the Eighth Circuit said:

“* * * But however this may be, it is obvious that it was of great importance to the railway company that the jury be instructed that the fact of the derailment of the train did not in itself raise a presumption of negligence for which it was chargeable. * * * It is familiar doctrine that in cases between employee and employer, the law does not presume carelessness or negligence on the part of the latter.”

See also

Shandrew v. C. St. P. M. & O. Ry., 142 Fed. Rep. 320;

McDonnell v. Oceanic Navigation Co., 143 Fed. Rep. 480.

And such is the law as laid down by the Supreme Court of the United States in *Patton v. Tex. & Pac. Ry. Co.*, 179 U. S. 658 (Law Ed., Book 45, p. 361), wherein it is said:

“* * * While in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely * * * a different rule applies as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. * * * That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony.”

It seems certain and beyond contradiction that the foregoing authorities state the rule of law governing this case, and necessitate a reversal of the judgment herein.

Of course, an employer is liable in damages for its negligence by which its servant suffers injury. Yet the employee must in his pleading specify the particular act or acts of negligence upon which he bases his claim to a recovery; he cannot, as can a passenger, plead the relation, the happening of the event, and the resulting injuries, and then recover upon proof of these allegations alone, even though his proof be uncontroverted. The employee in this case has specified only two alleged acts of negligence, that of the sudden lessening of speed of the car immediately preceding the one upon which he was riding, and that of the car behind the one upon which he was riding colliding with it. As a matter of fact, the plaintiff, by his own witnesses, has explained the lessening of the speed of the first car, and affirmatively disproven any negligence. As his own witnesses testify, the car slowed up because those propelling it were tired and could not go faster. [Trans. pp. 43-4.]

Why the car behind the one on which plaintiff was riding ran into it is unexplained by the evidence, and under the authorities quoted herein, the defendant cannot be found guilty of negligence without some explanation of the happening of the event affirmatively appearing from the evidence. As it is, that cause is shrouded in mystery and left only to conjecture; negligence of a master as against a servant cannot be predicated upon mere conjecture. If, however, conjecture were per-

missible, it seems that the only plausible conjecture is that the colliding of the rear car with that on which the plaintiff was riding was an accident pure and simple, resulting from the slackening of speed of the car preceding that upon which the plaintiff was riding, and that act, as has been above stated, was affirmatively proven not to have been the result of negligence.

Therefore, we confidently submit:

1. That the honorable trial court should have granted the defendant's motion for a non-suit, and,
2. That it should have instructed the jury as requested by the defendant in its request for instruction No. 1, and that the judgment in this case should be reversed because of its refusal to do each and both.

SECOND.

Further than this, assuming, though by no means admitting, that by some stretch of imagination the evidence in this case could be held to have proven negligence on the part of the defendant, yet the judgment should be reversed because the plaintiff's action, as hereinbefore stated, was founded upon the Federal Employers' Liability Act, and he must succeed or fail thereunder. We submit with considerable assurance that the plaintiff's evidence does not bring him within the protection of that act. Without doubt, under the decisions of the federal courts, which it is not necessary to here cite, the defendant railroad company was engaging in interstate commerce, but we think it is equally clear that the plaintiff was not so engaging at the time of his injury.

It is true that under the decision of the Supreme Court of the United States in the case of *Pedersen v. D. L. & W. Ry. Co.*, reported at page 648 *Advance Sheets of the Supreme Court Reports*, under date of July 1st, 1913, the plaintiff, while ballasting the main track of defendant during the day, was engaged in an act of interstate commerce, but we do not think it can be said that he was so engaged after he quit work and started to camp, as testified to by him and all the other witnesses.

Plaintiff in error is compelled to submit this phase of the case upon principle rather than upon direct and positive authority. But we think that what has been said in some of the federal cases upon this subject is directly pertinent to and coincident with plaintiff in error's position on this question. As said, we know of no case directly decisive of our contention one way or the other, so that reference to but a few of the decided cases will be all that will serve any good purpose here.

We have no fault to find with the case of *Central Railroad of N. J. v. Colasurdo*, decided by the Circuit Court of Appeals for the Second Circuit, December 11th, 1911, and reported in 192 *Fed. Rep.*, page 901. In that case the plaintiff was clearly engaged in an act of interstate commerce, in that he was repairing a switch, which was an instrumentality used in connection with the defendant's interstate commerce business, and the repair of which was necessary to the despatch and safety of its interstate commerce trains. What the court would have there decided had Colasurdo finished his work of repair and been proceeding to his home

after his hours of labor were over, the decision does not say.

As we understand it, the test as to whether or not plaintiff was engaged in interstate commerce at the time of his injury, lies in the answer to the question whether, at the time and place of his injury, such injury had, or was susceptible of having, any influence upon interstate commerce. If it did not, he was not engaging in interstate commerce, as we understand it.

“* * * As indicated in the opinion, the test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is, What is its effect upon interstate commerce? Does it have the effect to hinder, delay or interfere with such commerce? * * * Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce?”

Lamphere v. O. R. & N. Co., 196 Fed. Rep. 336.

The above case was decided by this Honorable Court on May 6th, 1912. In that case the necessary answers to the questions quoted necessitated a reversal of a judgment in favor of the defendant railroad company and a holding that Lamphere was engaged in interstate commerce. But Lamphere had not ceased his day's labor and started for home. He was then under orders of the railroad company on his way to take up his duties in connection with an interstate train, and any injury to him while so doing necessarily operated to

hinder, delay and interfere with interstate commerce as carried on by the train which he was being sent out to meet.

In the case at bar, after plaintiff's labors were over, an injury to him could have no possible effect upon interstate commerce. His injury could neither hinder nor delay, nor interfere with it; his personal safety could not accelerate it. When he ceased work on the track and started home, his duties, so far as any act of interstate commerce is concerned, were just exactly the same as if he had stayed at the place of work over night, or as if he had proceeded to his home at a place in a direction directly opposite from that in which the hand cars were proceeding. As far as the defendant railroad company was concerned, and as far as interstate commerce was concerned, it mattered not whether the plaintiff went into camp with the other men, whether he went to some other place, or whether he quit the service of the company entirely at the close of the day's work. In fact, at the time and place of his injury, it had no more effect on interstate commerce than had he resigned his position during the afternoon and had been at the time transported as an act of accommodation to Caliente, under which circumstances it certainly could not have been said that he was engaging in interstate commerce.

The question is not whether, for some purpose or other, the relation of master and servant still existed between him and the plaintiff in error, but whether or not the act in which he was then engaging, and his injury, or either of them, affected the defendant's inter-

state commerce business one way or the other, and we submit that it did not, and could not. Therefore, his case is not within the purview or intent of the act.

In the Pedersen case, *supra*, the Supreme Court said:

“* * * And so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?”

Naturally, the Supreme Court answered its own questions in the affirmative, because there Pedersen was actively engaged in the preparation of work connected with the repair of a bridge which was an instrumentality used in interstate commerce, and which it was the duty of the defendant company to keep in repair, and, of course, it was as much a duty to bring the materials necessary in the repair work on or to the bridge as to do the repairing itself. The “duty resting upon the carrier” being evidently a duty instrumental in the railroad company’s interstate transportation. When Pedersen was injured on his way to the bridge with materials, he certainly was performing a duty for the defendant incumbent upon it in connection with and for the betterment of its interstate transportation facilities.

Obviously not so in the case at bar, because the plaintiff's going to camp after his day's work was over, had not, and could not have, any effect to facilitate or delay the business of the railroad company as an interstate carrier. That business would have gone on as well had plaintiff gone to his home in some other direction, or had he preferred for his own convenience to spend the night at the place of work, or had he for any one of a dozen reasons deserted his job at the end of the day.

So far as we have been able to ascertain, the question here involved has not been passed upon; hence our failure to cite any direct authority for the guidance of the court. However, bearing in mind the purposes of the act in question, it seems quite clear upon principle that the plaintiff Davide was not engaged in any act of interstate commerce as contemplated by the Employers' Liability Act, because of which, we earnestly assert that the trial court erred in refusing to instruct the jury as requested by the defendant in its request for instructions No. 2, for which further error the judgment herein should be reversed.

Respectfully submitted,

A. S. HALSTED,

PENNEL CHERRINGTON,

Attorneys for Plaintiff in Error.

No. 2266.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

San Pedro, Los Angeles & Salt
Lake Railroad Company, a cor-
poration,

Plaintiff in Error,
vs.

Martini Davide,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

On the 25th day of April, 1911, defendant in error, hereafter referred to as plaintiff, was in the employ of plaintiff in error, hereafter referred to as defendant, in the capacity of section hand near Caliente in the state of Nevada. Upon that date plaintiff sustained injuries resulting in the amputation of his left hand.

The second amended complaint alleges [fols. 32-33] that on the day in question plaintiff was engaged in the repair of the main line track of defendant and that

acting under the directions of defendant's section foreman he was riding upon and assisting in propelling a hand-car used in connection with his work; that plaintiff was injured by reason of the negligence of other employees of defendant who materially slackened the speed of a hand-car which had been proceeding rapidly along said main line track in advance of plaintiff's car, resulting in a collision of the two cars, and by reason of the negligence of other employees of defendant in allowing a third hand-car which had been proceeding along said track in the rear of plaintiff's car to run into and collide with plaintiff's car.

The evidence shows [fols. 42-43] that at the date of the plaintiff's injury he was one of a gang of fifty or sixty men working for defendant ballasting the main line track in Nevada; that at about five o'clock on the night in question the gang started back to camp on seven hand-cars; that the section boss directed plaintiff to go on the third hand-car from the front and drive it back to camp [fol. 43]; that plaintiff was pumping on his hand-car with his back to the car preceding his; that his car was going along pretty fast; that the car preceding plaintiff's car was traveling quite fast just before the accident [fol. 43]; that all the cars were going as fast as they could pump, between nine and ten miles an hour [fol. 47]; that the car preceding plaintiff's car was going fast when half-way through the tunnel, but that when it was coming out of the tunnel the men pumping it were tired and slackened speed and came out of the tunnel slowly; at this point plaintiff's car, following rapidly, collided with it, plain-

tiff not knowing that the speed of the forward car had been slackened [fol. 43], and then the car following plaintiff's car collided with his car; that by these collisions plaintiff was injured, plaintiff's testimony being that he was thrown and injured by the collision of his car with the car preceding his [fol. 42].

ARGUMENT.

Plaintiff contends that the evidence shows:

I.

That the injuries sustained by plaintiff were the direct result of defendant's negligence as charged in the second amended complaint;

II.

That plaintiff and defendant were engaged in interstate commerce at the time of the negligent acts complained of.

I.

Medrano and Reyes, two of the men on the car preceding plaintiff's car, practically admitted their negligence when by their testimony they showed that with knowledge of the fact that cars following them were traveling fast, and that plaintiff was riding with his back towards their car so that he could not see what they did; they maintained their high rate of speed until half-way through the tunnel and then, without any warning, and merely because they were tired, and without regard for the consequences which would necessarily follow, slowed up coming out of the tunnel [fols.

43 and 45], and even then made no attempt to avoid an accident, when, as Reyes testified [fol. 45], plaintiff's car was seen coming thirty feet away.

Plaintiff occupying the position assigned to him to pump his hand-car, with his back to the car preceding his, had no means of knowing what was transpiring on the forward cars, and he had a right, therefore, to rely on the speed of the forward cars being maintained sufficiently to avoid a collision with his car running at the speed maintained by all the cars before the collision, and it was the duty of the men on the forward car to have maintained their speed or given warning to the cars following that they intended to stop. The collision happened without the intervention of any outside agency, and the circumstances as detailed by the witnesses clearly show that the same would not have occurred had the forward car maintained its speed along the track instead of stopping as it was emerging from the tunnel.

Defendant in its brief lays much stress upon the proposition that the mere happening of an accident is not of itself evidence of negligence. This we readily concede, and the lower court so instructed the jury [fol. 54].

Where a number of hand-cars are running on the same track a prudent regard for the safety of the persons on the cars would seem to require that a reasonable space should be maintained between them in order to avoid collision, and that the failure to maintain such space would constitute negligence. This view is supported by the testimony of the defendant's section fore-

man as a witness on the part of the defendant where he states:

“I always instructed the men to run the cars not closer than 300 feet” [fol. 46].

It is evident that the jury believed that both collisions occurred on account of the fact that the persons operating the hand-cars failed to maintain a sufficient space between them, or in other words, that they were negligent in not maintaining a sufficient space between the cars.

Defendant admits that the cause of the collision was the slackening of the speed of the car preceding the one upon which plaintiff was riding, but contends that it affirmatively appears that such slackening of speed was not the result of negligence (defendant's brief, p. 14). We do not agree with defendant's contention that it affirmatively appears that the slackening of speed was not the result of negligence. If the cars had been run in a careful and prudent manner with a sufficient space between them, no injurious results would have followed from the slackening of speed.

Defendant contends that the cause of plaintiff's injury was an accident pure and simple, its position being that an accident occurred independent of any act done or omitted by any of defendant's employees. If that contention be true, we may admit its conclusion. If, for instance, the car upon which plaintiff was riding had been in good condition, being properly propelled upon a track in good condition, and had been blown from that track by a hurricane, we admit that no liability on the part of defendant would have been shown,

but where the collision was caused, as is shown by the evidence, by the slackening of the speed of the car preceding the one upon which plaintiff was riding, we submit that the question as to whether the slackening of that speed or the failure to maintain a reasonable distance between the different cars constituted negligence was a question to be determined by the jury. The speed of the car preceding the one upon which plaintiff was riding was slackened; a double collision occurred; the car upon which plaintiff was riding collided with the car preceding it and the car following the car upon which plaintiff was riding also collided. Someone was negligent in failing to maintain a proper distance between the cars. Either the crew upon the first car was negligent in slackening the speed or the crew of the last car was negligent in not slackening their speed or in not maintaining a sufficient distance between their cars and the one upon which plaintiff was riding. The accident occurred as the result of a combination of these various elements of negligence and not from something over which the employees of defendant had no control.

The contentions of the plaintiff and defendant on the question of negligence, as shown by the pleadings and evidence, may be briefly stated as follows, viz.:

By plaintiff—the cars preceding and following the one on which plaintiff was riding were negligently operated, resulting in the collision which caused plaintiff's injury;

By defendant—plaintiff was engaged in playing in

jumping from one car to another, by reason whereof he fell between the cars.

Defendant in its brief seeks to eliminate the theory upon which it tried the case by admitting that the verdict of the jury against it is conclusive—but the fact remains that both by its pleadings [fol. 23] and evidence [fols. 46-48] it relied upon the defense that the plaintiff was engaged in play and jumped from one car to another.

The contentions of the respective parties in regard to the cause of the collision were submitted to the jury under appropriate instructions in which the law defining negligence was correctly stated. The jury adopted plaintiff's view of the case and returned a verdict accordingly. The evidence was conflicting and the verdict should be sustained.

Defendant in its brief says:

"Negligence of a master as against a servant cannot be predicated upon mere conjecture" (page 13).

Upon this point and upon the general question of the province of the jury in the determination of the question as to whether or not negligence may be inferred from circumstances, we desire to call attention to the recent case of *Perkins v. Northern Pac. Ry. Co.*, 199 Federal 712, decided by this court in October, 1912. The court there says (p. 719):

"That the cause of an accident may be inferred from circumstances does not admit of doubt."

The court then calls attention to various circumstances from which the cause of the accident might be

inferred, and quotes from *Railroad Co. v. Stout*, 17 Wall. 657, 664 (21 L. Ed. 745), as follows:

“Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer, those sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that 12 men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts occurring than can a single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.”

II.

The second point treated by defendant in its brief is its contention that although plaintiff while ballasting the main track of defendant during the day was engaged in interstate commerce, he was not so engaged after he had quit work and started to camp. (Defendant's brief, p. 15.) Defendant's position on this point, as stated in its brief (p. 17), is that as far as interstate commerce was concerned and as far as the defendant railroad company was concerned, it mattered not whether the plaintiff went into camp with the other men, whether he went to some other place or whether

he quit the service of the company entirely at the close of the day's work.

Plaintiff had not entirely ceased his day's labor at the time of the accident. The seven or eight hand-cars which the men used in connection with their work could not be left standing on a main line track over night, and plaintiff, himself, testified:

"The boss sent me on that hand-car to drive it back to camp" [fol. 43];

and O'Brien, the section foreman, a witness on behalf of defendant, testified:

"Before the accident I instructed the men where to put the cars on the track." [fol. 46].

This court in the case of *Lamphere v. Oregon R. & Nav. Co.*, 196 Federal 336, at page 337 *et seq.*, said:

"There are decisions which hold that an employee of a railroad company while going to and from his work is not engaged in the service of his employer, and is not the fellow servant of other employees of the same master, but there are cases holding to the contrary, and, whatever may be the conflict of authority as to the ordinary case of an employee going to and from his work, there can be no question that he is in the service of his master, and is a fellow servant of his co-employees whenever he is doing that which under his contract of employment he is bound to do (citing cases). The deceased when he was killed, was not only on his way to work for his employer, but he was proceeding under the direct and peremptory command of the railroad company to do a designated specific act in the service of the company, to-wit, to move a train then engaged in interstate commerce."

And in the same case this court quotes with approval from *Behrens v. Illinois Central R. Co.* (D. C.), 192 Fed. 581, as follows:

"I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixed his status and fixes the status of the railroad, and the mere fact that the accident occurred while he was engaged in work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train, it is immaterial. If he was engaged in two occupations that are so blended as to be inseparable, and where the employee himself has no control over his own actions, and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."

The case of *Stone-Webster Engineering Corporation v. Collins*, 199 Federal 581, decided by this court, is directly in point. This court in that case says (page 586):

"Another question presented is whether the plaintiff at the time of the accident was acting within the scope of his employment, so as to render the defendant liable for his injury. It is urged that the relation of master and servant had ceased to exist, plaintiff having quit work for the night, and that the risk of injury attending his further movements was his own, and not that of the company. Perhaps ordinarily such would be the case. There is evidence here, however, tending to show that the men were permitted to ride in on the engine and cars from their work in going to their camp. * * * If at this juncture the relation of master and servant had ceased to exist, though there is authority to the contrary (citing case), the defendant was still under obligation to observe reasonable care for the protection of the plaintiff while on his way to camp."

It is true that defendant could have elected to set the hand-cars to one side, away from the track, and allowed the men to choose their own means of getting to camp. Plaintiff had no such choice. To expedite the repair of its main line track defendant provided these cars as a means of transporting the men back and forth [fol. 46], and made it a part of plaintiff's duty to return his car to camp as soon as the repair work for the day was over. That the transferring of these men back and forth on the hand-cars expedited the work of repairing the main line track must be inferred from the fact that the company made it a practice to provide the cars and direct the men to use them, and that it was not a departure from the custom of the company is shown by the testimony of the section foreman:

“I used seven or eight cars, sometimes nine, in transferring the men back and forth” [fol. 46].

Respectfully submitted,

HARRIS & SWANWICK,

BURT CHELLIS,

CHAS. E. DONNELLY, JR.

Attorneys for Defendant in Error.

No. 2271

United States
Circuit Court of Appeals

For the Ninth Circuit.

J. J. COLE, Trustee, and WILLIAM A. GIL-
MORE, Intervenor,

Appellants,

vs.

FRANK H. WASKEY,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Alaska, Second Division.

FILED

AUG 11 1913

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of] Attorneys of Record.

J. J. CHAMBERS, Nome, Alaska,
Plaintiff, in *Propria Persona*.

ALBERT FINK, San Francisco, Cal., IRA D. OR-
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Alaska,

Attorneys for Petitioner and Defendant
Waskey.

G. J. LOMEN, Nome, Alaska, WILLIAM A. GIL-
MORE, Nome, Alaska,
Attorneys for Trustee and Intervenor.

*In the District Court for the District of Alaska, Sec-
ond Division.*

No. —.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

Second Amended Complaint.

Comes now the plaintiff in the above-entitled ac-
tion, and by leave of Court first had and obtained,
makes this his second amended complaint and for
cause of action alleges:

1. That at all the times and dates herein men-
tioned, plaintiff was and is owner in fee and en-
titled to the possession of the following described
property, to wit:

An undivided one-half ($1\frac{1}{2}$) interest of that certain placer mining claim named and known as the Bon Voyage, situated in the Cape Nome Recording District, District of Alaska, and described by metes and bounds as follows, to wit: Commencing at the initial stake which is situated about 1500 feet in a southerly direction from the upper end line of Creek claim No. 3 Below on Newton Gulch, a tributary of Dry Creek, said stake being in the north end line of said claim; thence 330 feet in a westerly direction and parallel to said Newton Gulch to corner stake No. 1; thence 1320 feet in a southerly direction and at right angles to corner stake No. 2; thence 660 feet in an easterly direction to corner stake No. 3; thence 1320 feet in a northerly direction to corner stake No. 4; thence 330 feet to the initial stake or place of beginning; said claim being situate on the divide known as Gold Hill, which is between Newton Gulch and Nome River, and is next to a certain bench claim known as Gold Hill Claim No. 1, and contains about 20 acres of placer mining ground.

That plaintiff's estate in said property is under [1*] and by virtue of a location thereof by one J. Potter Whittren, one of the above defendants, made in the year 1902, and by mesne conveyance, from said defendant Whittren, for this plaintiff, subsequent to last mentioned date.

2. That the defendants wrongfully and unlawfully withhold possession of said premises from plaintiff and have extracted a large amount of gold and other precious metals from said claim to the

*Page number appearing at foot of page of original certified Record.

plaintiff's damage in the sum of seventy-five thousand dollars (\$75,000).

WHEREFORE, plaintiff prays judgment that he is the owner of an undivided one-half ($\frac{1}{2}$) interest in said claim and for possession thereof, and for damages in the sum of seventy-five thousand dollars (\$75,000), and for his costs and disbursements included in this action.

C. D. MURANE,
Attorney for Plaintiff.

United States of America,
District of Alaska,—ss.

J. J. Chambers, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing second amended complaint, knows the contents thereof and the matters therein stated are true as he verily believes.

J. J. CHAMBERS.

Subscribed and sworn to before me, this 20 day of November, 1906.

[Notarial Seal] GEO. D. SCHOFIELD,
Notary Public. [2]

Service of copy of the foregoing second amended complaint, received this 20 day of November, 1906.

IRA D. ORTON,
For Waskey.

O. D. COCHRAN,
Attorney for Defendant.

[Endorsed]: No. 1629. In the District Court, District of Alaska, Second Division. J. J. Chambers,

Plaintiff, vs. Andrew Eadie et al., Defendants.
Second Amended Complaint. Filed in the office of
the Clerk of the Dist. Court of Alaska, Second Division,
at Nome. Nov. 23, 1906. Jno. H. Dunn, Clerk.
By —————, Deputy. C. D. Murane, Attorney
for Plaintiff. McB. [3]

**[Answer of Frank H. Waskey to Second Amended
Complaint.]**

District Court, District of Alaska, Second Division.
J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,
Defendants.

Comes now Frank H. Waskey, one of the defendants in the above-entitled action, and for answer to plaintiff's second amended complaint denies and alleges as follows:

I.

Denies each and every allegation of plaintiff's second amended complaint.

II.

And for a further, separate and affirmative answer said defendant Waskey alleges:

1. That the Bon Voyage Claim mentioned and described in plaintiff's said second amended complaint was located as a placer mining claim by the defendant Whittren on the 1st day of January, 1902;

that from the 1st day of January, 1902, until the 24th day of September, 1905, the said Whittren continued to be the owner in fee of said claim; that on the said 24th day of September, 1905, the said Whittren, for a valuable consideration, by deed [4] in writing, granted, sold and conveyed to the defendant Eadie an undivided one-half interest in said claim, and ever since the said last mentioned date the said Whittren and the said Eadie have been, and they now are, the sole owners of said claim as tenants in common.

2. That on the 11th day of June, 1906, the said Whittren and the said Eadie were so the owners of said claim as tenants in common, and were then and there in the sole, quiet and exclusive possession of the same, and on said date the said Whittren and Eadie did by an instrument in writing lease, let and demise a portion of said claim to the defendant Waskey for the term to commence at the execution of said lease and ending on the 1st day of June, 1908; that the portion of said claim so leased, demised and let to this defendant is bounded and described as follows:

All the following described lands and premises, situate in Cape Nome Mining and Recording District, of Alaska, to wit: Commencing at the southwest corner stake of the Bon Voyage Placer Mining Claim; thence northerly along the westerly boundary line of said mining claim 1320 feet to the northwest corner thereof; thence easterly along the northerly boundary line of said mining claim 220 feet; thence southerly 1320 feet to the southerly boundary line

of said mining claim; thence westerly 220 feet to the point and place of beginning; being a part of the said Bon · Voyage Placer Mining Claim, the location notice whereof is of record in the office of the Recorder of said Cape Nome Recording District in Book 99, at page 296, of the Records of said District.

That immediately upon the execution of said lease the defendant Waskey entered upon said portion of said claim and commenced to mine and prospect the same for gold in accordance with the terms of said lease and is still so engaged; that the defendant Waskey has at all times kept and [5] performed, and is now keeping and performing all the terms of said lease on his part to be kept and performed; that defendant made and entered into said lease in good faith, for a valuable consideration, without any knowledge or notice whatever of plaintiff's alleged interest in said claim, and defendant commenced and continued to work, mine and operate said claim for a long period of time, in like good faith, at great expense and without any knowledge or notice of plaintiff's alleged interest in said claim.

That said lease hereinbefore referred to was by this defendant on August 22d, 1906, filed for record in the office of the Recorder of the Cape Nome Recording District, District of Alaska, within which said claim was and is situated, and was thereafter duly recorded in Vol. 164 at page 133 of the Records of said District; that a true copy of said lease is hereunto annexed, marked Exhibit "A," and made a part of this answer.

3. The defendant Waskey further alleges that

afterwards, to wit, on the 20th day of June, 1906, the said Whittren and the said Eadie were so the owners of said claim as tenants in common and were then and there, together with this defendant as lessee of the portion thereof hereinbefore described, in the sole, quiet and exclusive possession of the said claim, and on the said 20th day of June, 1906, the said Whittren, Eadie and this defendant made and entered into a certain lease and contract of the remaining portion of said mine for the term commencing on said 20th day of June, 1906, and ending on the 20th day of June, 1908; that the remaining portion of said mine described in said lease and contract last hereinabove referred to is described as follows:

The easterly 440 feet of said mining claim, being all of the said claim not heretofore leased by the said Eadie and the said Whittren to the said Waskey.
[6]

That immediately upon the execution of said contract and lease, the defendants Eadie and Waskey entered upon said portion of said claim described therein and commenced to mine and prospect the same for gold in accordance with the terms of said lease and they are still so engaged; that the defendants Waskey and Eadie have at all times kept and performed and are now keeping and performing all the terms of said contract and lease on their part to be kept and performed.

That the said Waskey made and entered into said contract and lease in good faith, for a valuable consideration, without any knowledge or notice whatever of plaintiff's alleged interest in said claim, and the

said defendant Waskey commenced and continued to work, mine and operate said claim and the portion described in said contract and lease last hereinbefore referred to for a long period of time, in like good faith, at great expense and without any knowledge or notice of plaintiff's alleged interest in said claim.

That said lease and contract last hereinbefore referred to was by this defendant on the 30th day of August, 1906, filed for record in the office of the Recorder of the Cape Nome Recording District, District of Alaska, within which said claim was and is situated, and was thereafter duly recorded in Vol. 164 at page 138 of the Records of said District; that a true copy of said contract and lease is hereto annexed, marked Exhibit "B" and made a part of this answer.

4. This defendant Waskey further alleges that he has hereinbefore set forth the nature and duration of his estate in the real property described in plaintiff's complaint and of his license and right to the possession thereof, and further alleges that he is in the possession of said property under and by virtue and pursuant to the two leases and contracts, Exhibits "A" and "B," hereinbefore mentioned. [7]

WHEREFORE, having fully answered this defendant prays to go hence dismissed with judgment for his costs.

ALBERT FINK,

IRA D. ORTON,

Attorneys for Defendant Frank H. Waskey.

United States of America,
District of Alaska,—ss.

Ira D. Orton, being first duly sworn, deposes and says: That he is the attorney for Frank H. Waskey, one of the defendant in the above-entitled action; that he has read the above and foregoing answer and knows the contents thereof and believes the same to be true; that the reason this affidavit is made by affiant instead of the said Frank H. Waskey is because the said Frank H. Waskey is absent from the District of Alaska and for that reason unable and incapable of making this verification.

IRA D. ORTON.

Subscribed and sworn to before me, this 14th day of January, 1907.

[Notarial Seal] IDA G. CHAQUETTE,
Notary Public in and for the District of Alaska,
Residing at Nome. [8]

[**Exhibit "A" to Answer of Frank H. Waskey to
Second Amended Complaint — Lease, Dated
June 11, 1906, Andrew Eadie et al. and F. H.
Waskey.**]

#36729.

THIS INDENTURE, made this eleventh day of June, in the year nineteen hundred and six, between ANDREW EADIE and J. POTTER WHITTREN, both of Nome, Alaska, lessors, and F. H. WASKEY, of the same place, lessee, WITNESSETH:

That the said lessors, for and in consideration of the rents, royalties, covenants, and agreements here-

inafter reserved and contained and by the said lessee to be paid, kept, and performed, do hereby lease, demise, and let unto the said lessee all the following described lands and premises, situate in Cape Nome Mining and Recording District, District of Alaska, to-wit: Commencing at the southwest corner stake of the BON VOYAGE Placer Mining Claim; thence northerly along the westerly boundary line of said mining claim 1320 feet to the northwest corner thereof; thence easterly along the northerly boundary line of said mining claim 220 feet; thence southerly 1320 feet to the southerly boundary line of said mining claim; thence westerly 20 feet to the point and place of beginning; being a part of the said BON VOYAGE Placer Mining Claim, the location notice whereof is of record in the office of the recorder of said Cape Nome Recording District in book 99, at page 296, of the records of the said district.

TO HAVE AND TO HOLD all and singular the said demised premises, together with the appurtenances, unto the said lessee for the term commencing on the date hereof and expiring at noon on the first day of June, nineteen hundred and eight, unless sooner forfeited or determined through the violation by the said lessee of any covenant or agreement [9] hereinafter contained and by him to be kept and performed.

And in consideration of such demise and lease the said lessee does covenant and agree with the said lessors as follows, to wit:

1. To enter upon the said premises within five days from the date hereof and thereafter to pros-

pect, work, and mine the same in good and miner-like manner, so as to take out the greatest possible amount of gold and gold-dust therefrom, with due regard to the continued future working of the said mining claim and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously during the term of this lease; cessation of labor for a period of ten days to be deemed a violation of this agreement.

2. To properly timber all shafts and to keep all shafts, tunnels, drifts, and stopes clear and in good and safe condition.

3. To allow the said lessors, and their agent or agents, at all times, to enter upon and into all parts of the said premises, for purposes of inspection, and to be present and to assist at all cleanups, the retorting of the amalgam, and the weighing of the retort.

4. To give to the said lessors, at Nome, Alaska, at least ten hours' notice of each and every cleanup, and to make no cleanup without giving such notice.

5. To make and file for record an affidavit of the performance of the required annual labor upon the said mining claim, during each calendar year of the term of this lease.

6. To pay to the said lessors, as royalty, thirty-five per centum (35%) of all gold, gold-dust, and other precious minerals and metals mined or extracted from the said premises during the term of this lease and to pay and deliver to the [10] said lessors such royalty out of, and immediately after, each and every cleanup.

7. To allow no person or persons not in privity with the said parties hereto to take or hold possession of the said premises, or any part thereof, under any pretense whatever, during the said term.

8. Not to assign this lease, or any interest herein, and not to sublet the said premises, or any part thereof, without the written consent of the said lessors.

9. To quit and deliver up to the said lessors the possession of the said premises, X.....x, in good order and condition for continued future mining, without demand or further notice, on said first day of June, 1906, or at any time previous upon demand for forfeiture.

It is expressly agreed that, upon the violation by the said lessee of any covenant or agreement herein contained, this lease, and the term hereof, shall, at the option of the lessors, become forfeited and determined, and the said lessors may at once enter into the possession of the said premises and remove any and all persons found thereon.

Each and every part and covenant hereof shall extend to and be binding upon the heirs, executors, administrators, and assigns of the lessors, and, at the option of the lessors, the executors, administrators, and assigns of the said lessee.

IN WITNESS WHEREOF, the said parties have

hereunto set their hands and seals the day and year first above written.

Done in triplicate.

ANDREW EADIE. [Seal]

J. POTTER WHITTREN. [Seal]

F. H. WASKEY. [Seal]

Signed, sealed and delivered in the presence of:

F. E. FULLER.

A. G. BLAKE. [11]

District of Alaska,

Cape Nome Precinct,—ss.

THIS IS TO CERTIFY, that on this 11th day of June, A. D. 1906, before me, the undersigned, a Notary Public in and for the District aforesaid, duly commissioned and qualified, personally came Andrew Eadie, J. Potter Whittren and F. H. Waskey, to me known and known to be the same persons described in and whose names are subscribed to the within instrument, and acknowledged that they executed the same freely and voluntarily.

WITNESS my hand and notarial seal this 11th day of June, A. D. 1906.

[Notarial Seal]

F. E. FULLER,

Notary Public for Alaska.

Filed for Record Aug. 22, 1906, 2:20 P. M. Request of F. H. Waskey.

F. E. FULLER,

Recorder.

Deputy.

United States of America,
District of Alaska,
Precinct of Cape Nome,—ss.

I, F. E. Fuller, United States Commissioner and Ex-officio Recorder in and for the Precinct of Cape Nome in the Second Judicial Division of the District of Alaska, do hereby certify that the above and foregoing is a true, full and complete copy of Instrument numbered 36729, the same being agreement between Andrew Eadie, and J. Potter Whittren, lessors, and F. H. Waskey, lessee, as the same appears of record in Volume 164, at page 133 thereof, of the records of my office.

WITNESS my hand and the seal of the said office this 12th day of October, 1906.

[Seal]

F. E. FULLER,
Recorder.

By F. R. Cowden,
Deputy. [12]

**[Exhibit "B" to Answer of Frank H. Waskey to
Second Amended Complaint — Contract and
Lease, Dated June 20, 1906, Andrew Eadie et
al. and F. H. Waskey.]**

#36869.

AGREEMENT.

THIS AGREEMENT, Made this 20th day of June, in the year nineteen hundred and six, By and Between ANDREW EADIE, J. POTTER WHITTREN, and F. H. WASKEY, all of Nome, Alska,

WITNESSETH:

WHEREAS, the said Eadie and Whittren are the

owners of the BON VOYAGE Placer Mining Claim, situate in Cape Nome Mining District, Alaska, the location notice whereof is of record in the office of the Recorder of the Cape Nome Recording District, in book 99, at page 296 of the Records of said District;

AND WHEREAS, the said Eadie and Waskey desire to work and mine the Easterly 440 feet of said mining claim, being all of the said claim not heretofore leased by the said Eadie and Whittren to the said Waskey:

NOW, THEREFORE, in consideration of the premises and of the sum of One (\$1.00) Dollar, by the said parties paid, each to the other, the receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, it is agreed as follows:

The said Eadie and Waskey agree to enter upon the said premises within one days from the date hereof, and thereafter to prospect, work and mine the same in good and miner-like manner so as to take out the greatest amount of gold and gold-dust therefrom, with due regard to the continued future working of the said premises and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously for the full term of two (2) years from the date hereof, or until said premises shall have been thoroughly and completely mined and worked out; [13] cessation of labor for a period of ten (10) days to be deemed a violation of this agreement.

To properly timber all shafts and to keep all

shafts, tunnels, drifts and stopes clear and in good and safe condition;

To allow the said Whittren or his agent at all times to enter upon and into all parts of the said premises for purposes of inspection, and to be present and to assist at all cleanups, the retorting of the amalgam, and the weighing of the retort, and to give said Whittren or his agent due notice of each and every cleanup.

IT IS AGREED that of all the gold, gold-dust and other precious minerals and metals mined or extracted from the said premises by the said Eadie and Waskey, under this agreement, one-eighth ($\frac{1}{8}$) part shall be paid and delivered to said Whittren immediately after each and every cleanup, and one-eighth ($\frac{1}{8}$) part to the said Eadie, and the remainder shall be retained by, and equally divided between, the said Waskey and Eadie, after paying from such remainder all costs and expenses of mining and operating under this agreement; the expense of first locating pay, however, to be borne solely by said Waskey.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals in triplicate, the day and year first above written.

J. POTTER WHITTREN. [Seal]

ANDREW EADIE. [Seal]

F. H. WASKEY. [Seal]

Signed, sealed and delivered in the presence of:

P. D. OVERFIELD. [14]

District of Alaska,

Cape Nome Precinct,—ss.

THIS IS TO CERTIFY that on this 30th day of

August, A. D. 1906, before me, the undersigned, a Notary Public in and for the District aforesaid, duly commissioned and qualified, personally came Andrew Eadie, J. Potter Whittren and F. H. Waskey, to me known and known to be the same persons described in and whose names are subscribed to the within instrument, and acknowledged that they executed the same freely and voluntarily.

WITNESS my hand and notarial seal this 30th day of August, A. D. 1906.

[Notarial Seal]

F. E. FULLER,

Notary Public for Alaska.

Filed for Record Aug. 30, 1906, 2:50 P. M., request of F. H. Waskey.

F. E. FULLER,

Recorder.

Deputy.

(Vol. 164, page 138.)

United States of America,
District of Alaska,
Precinct of Cape Nome,—ss.

I, F. E. Fuller, United States Commissioner and Ex-officio Recorder in and for the Precinct of Cape Nome in the Second Judicial Division of the District of Alaska, do hereby certify that the above and foregoing is a true, full and complete copy of Instrument numbered 36869, the same being agreement between Andrew Eadie, J. Potter Whittren and F. H. Waskey, as the same appears of record in Volume 164, at page 138 thereof, of the records of my office.

WITNESS my hand and the seal of the said office
this 12th day of October, 1906.

[Seal]

F. E. FULLER,

Recorder.

By F. R. Cowden,

Deputy. [15]

United States of America,
District of Alaska,—ss.

Due service of the within answer is hereby accepted at Nome, Alaska, this 14 day of January, 1907, by receiving a copy thereof.

C. D. MURANE,

Attorney for Plff.

[Endorsed]: #1629. Original. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Answer of Waskey to Second Amended Complaint. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 15, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. Ira D. Orton, Attorney for Deft. F. H. Waskey. [16]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

Reply.

Comes now the plaintiff J. J. Chambers and for reply to the separate answer of the defendant Frank H. Waskey to plaintiff's second amended complaint, denies and alleges as follows:

I.

For reply to Paragraph I to defendant's further separate and affirmative answer and defense, plaintiff denies each and every allegation contained in said paragraph, except that the Bon Voyage Claim was located as a placer mining claim by the defendant Whittren on the 1st day of January, 1902, and that the said defendant Whittren for a valuable consideration by deed in writing, granted, sold and conveyed to the defendant Eadie an undivided one-half ($\frac{1}{2}$) interest in said claim.

II.

For reply to the second paragraph of said answer, plaintiff denies any knowledge or information sufficient to form a belief as to the matters contained in said paragraph, and therefore denies the allegations of said paragraph and the whole thereof, except that plaintiff admits that said [17] Bon Voyage Claim is situated in the Cape Nome Recording District, District of Alaska.

III.

For reply to Paragraph III of said answer of defendant Waskey, plaintiff denies any knowledge or information sufficient to form a belief as the truth of the matters therein stated and therefore denies each and every allegation contained in said para-

graph, except that said claim is situated in the District of Alaska.

IV.

For reply to Paragraph IV of said answer of the defendant Waskey, plaintiff denies any knowledge or information sufficient to form a belief as to the truth of the matters therein stated, and therefore denies each and every allegation contained in said paragraph.

WHEREFORE, plaintiff, having fully replied to the said answer of the defendant Waskey, prays judgment as he has heretofore prayed in his complaint on file herein.

C. D. MURANE,
Attorney for Plaintiff.

United States of America,
District of Alaska,—ss.

J. J. Chambers, being first duly sworn, upon his oath deposes and says: I am plaintiff in the foregoing reply, have read said reply and know the contents thereof and the matters therein stated are true as I verily believe.

J. J. CHAMBERS.

Subscribed and sworn to before me this 10 day of June, 1907.

[Notarial Seal] C. D. MURANE,
Notary Public in and for the District of Alaska,
Residing at Nome, Alaska. [18]

Service of the foregoing reply received by copy this 10th June, 1907.

IRA D. ORTON,
Atty. for Deft. Frank H. Waskey.

[Endorsed]: No. 1629. In the District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie, J. Potter Whittren and Frank H. Waskey, Defendants. Reply to Answer of Deft. Waskey. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jun. 10, 1907. Jno. H. Dunn, Clerk. By _____, Deputy. C. D. Murane, Attorney for Plaintiff. McB. [19]

[Mandate U. S. Circuit Court of Appeals in Andrew Eadie et al. vs. J. J. Chambers, No. 1595.]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the District of Alaska, Second Division, Greeting:

Seal Circuit Court
of Appeals
Ninth Circuit.

Whereas, lately in the District Court of the United States for the District of Alaska, Second Division, before you, or some of you, in a cause between J. J. CHAMBERS, Plaintiff, and ANDREW EADIE, J. POTTER WHITTREN, and FRANK H. WASKEY, Defendants, No. 1629, a judgment was duly filed on the 12th day of October, A. D. 1907, in favor of the said plaintiff and against the said defendants; which said judgment is of record in the said cause in the office of the Clerk of the said District Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the Transcript of the Record of

the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of a writ of error prosecuted by Andrew Eadie, J. Potter Whittren and F. H. Waskey as plaintiffs in error agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 19th day of October in the year of our Lord One Thousand, Nine Hundred and Eight the said cause came on to be heard before the said Circuit Court of Appeals, upon the said Transcript of the Record, and was duly argued and submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs in favor of the defendant in error; and that the defendant in error J. J. Chambers recover against the plaintiffs in error Andrew Eadie, [20] J. Potter Whittren and F. H. Waskey, for his costs herein expended, and have execution therefor.

(July 6, 1909.)

You, therefore, are hereby commanded that such execution and further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the elev-

enth day of October, in the year of our Lord One Thousand Nine Hundred and Nine.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

COSTS OF DEFENDANT IN ERROR:

Certified cost of the Transcript from
the Court below.....\$
Miscellaneous Costs, U. S. Circuit
Court of Appeals.....\$ 8.70
Cost of Printing Record U. S. Cir-
cuit Court of Appeals.....\$
Attorney's Docket Fee.....\$20.00

Taxed at.....\$28.70

F. D. MONCKTON,

Clerk. [21]

BILL OF COSTS—ITEMS IN CASE No. 1595.

Costs

Item Number	Dr. Items	Dr. Cr.	taxed in Mandate.
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(1) Docketing Cause and Fil- ing Record.....	5	00	
(2) Entering 2 Appearance...	50		
(3) Entering Continuance ..			
(4) Entering 2 Order.....	40		
(5) Filing 15 Paper.....	3	75	
(6) Filing Briefs for Each Party Appearing (2)...	10	00	
(7) Filing.....			
(8) Filing.....			

(9)	Filing Argument Mr. Metson.....	5 00
(10)		
(11)	Transferring Cause on Printed Calendar (2).	2 00
(12)	Drawing, Filing and Re- cording Decree or Judg- ment.....	1 65
(13)		
(14)	Filing Petition for a Re- hearing.....	5 00
(15)		
(16)	Issuing.....	
(17)		
(18)		
(19)	Issuing Mandate, \$5.00; Costs and Copy, \$0.40..	5 40
(20)		

	Total, Miscellaneous Costs.....	38 70
(21)	Certified Cost of the Tran- script from the Court Below	
(22)		
(23)	Expense, Printing Rec-.. ord.....	
(24)		
(25)	Attorney's Docket Fee..	20.00

Item			
Number	Cr. Items.		
(1)	Deposit, Rule 17, (W. H. Metson)	25 00	
(2)	Filing Brief of Defendant in Error.		
(3)	(C. D. Murane)	5 00	5 00
(4)	Filing Argument (W. H. Metson)	5 00	
		<hr/>	
	Total, Miscellaneous Deposits	35 00	
(5)	Certified Cost of the Transcript from the Court Below.		
(6)			
(7)	Expense, Printing Record.		
(8)			
(9)	Attorney's Docket Fee..	20 00	20 00
(10)	Balance costs paid by A. H. Elliot.	3 70	3 70
		<hr/>	
	Totals.	58 70	58 70 28 70

Attest: F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed]: #1629. No. 1595. United States Circuit Court of Appeals for the Ninth Circuit. Andrew Eadie et al. vs. J. J. Chambers. Mandate Under Rule 32. Filed in the Office of the Clerk of

the Dist. Court of Alaska, Second Division, at Nome. Oct. 28th, 1909. Jno. H. Dunn, Clerk. By _____, Deputy. D. Vol. 7. Orders and Judgments, p. 492. C.

#1629. Chambers vs. Eadie et al. Respondents' Exhibit No. 2. Sept. 3, 1912. J. A. B. [22]

*In the District Court for the District of Alaska,
Second Division.*

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

**Order [Directing Miners and Merchants' Bank of
Nome, Alaska, to Pay Plaintiff Certain Money,
etc.]**

This matter coming on for hearing this 29th day of October, 1909, upon the application of plaintiff for an order directing the Miners & Merchants' Bank, of Nome, Alaska, to pay to the plaintiff all moneys received and held by it from the gold-dust taken from the Bon Voyage Placer Claim, the claim in controversy in the above-entitled action, to apply on the plaintiff's judgment in the above-entitled action; and it appearing to the Court from the records and files of this case that certain amounts of gold-dust were heretofore deposited with the Miners & Merchants' Bank, of Nome, Alaska, and subse-

quently by order of this Court reduced to money and held by said Miners & Merchants' Bank, subject to the further order or orders of this Court in this action; and, it further appearing to the Court from the records of the case that on the 12th day of October, 1907, a judgment was entered in this case, decreeing and directing the said Miners & Merchants' Bank to pay the said money so held to the plaintiff to apply upon said judgment, and that thereafter a stay of execution was granted in the above-entitled action, staying the payment of the same; and, it further appearing to the Court that on the 28th day of October, 1909, the mandate of the Circuit Court of Appeals for the Ninth Circuit has been duly filed with the Clerk of [23] the above-entitled court, affirming the said judgment and decree of October 12th, 1907; and, it further appearing to the Court that plaintiff is entitled to the said money now held by said Miners & Merchants' Bank under the stipulations and orders heretofore signed and filed in this action; and the Court being otherwise fully advised in the premises,

NOW ORDERS AND DIRECTS that said Miners & Merchants' Bank of Nome, Alaska, pay to the plaintiff to apply on the said judgment all sum or sums of money received and held by it under the stipulations and orders of the above-entitled court heretofore signed and filed, said sum or sums of money so to be paid to plaintiff to apply on the said judgment of October 12th, 1907, in this action.

Done in open court this 29th day of October, 1909.

ALFRED S. MOORE,

District Judge.

[Endorsed]: No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Order. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 29, 1909. Jno. H. Dunn, Clerk. By Z., Deputy. William A. Gilmore, Attorney at Law, Nome, Alaska. C. Attorney for Plaintiff. Vol. 7, Orders and Judgments, p. 498.

#1629. Chambers vs. Eadie et al. Respondent's Exhibit No. 3. Sept. 3, 1912. J. A. B. [24]

**[Mandate Supreme Court of the United States in
Frank H. Waskey vs. J. J. Chambers, No. 221.]**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to
the Honorable the Judge of the Dis-
trict Court of the United States for the
District of Alaska, Second Division,
Greeting:

Seal of the Su-
preme Court of
the United
States.

Whereas, lately in the United States Circuit Court of Appeals for the Ninth Circuit, in a cause between Andrew Eadie, J. Potter Whittren, and Frank H. Waskey, plaintiffs in error, and J. J. Chambers, defendant in error, wherein the judgment of the said Circuit Court of Appeals, entered in said cause on

the 6th day of July, A. D. 1909, is in the following words, viz.:

“This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Alaska, Second Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs in favor of the defendant in error; and that the defendant in error J. J. Chambers recover against the plaintiffs in error Andrew Eadie, J. Potter Whittren and F. H. Waskey, for his costs herein expended, and have execution therefor.”

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of certiorari granted on the petition of Frank H. Waskey, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eleven, the said cause came on to be heard before the said SUPREME COURT, on the said transcript of record, and was argued by counsel: [25]

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, reversed with

costs; and that the said Frank H. Waskey recover against the said J. J. Chambers six hundred and sixty-two dollars, and ten cents for his costs herein expended, and have exception therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Alaska, Second Division, for further proceedings in conformity with the opinion of this Court.

May 13, 1912.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 14th day of June, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

COSTS OF FRANK H. WASKEY.

Clerk.....	\$285.60
Printing Record....	\$356.50
Attorney	\$ 20.00

\$662.10

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1911.

Costs of FRANK H. WASKEY, in No. 221.

1909, October Term—Docketing cause and filing record, \$5.00; appearance, .25; filing praecipe, .25; filing papers, .75; filing briefs, \$5.00; submission, .20; order, .20; writ, \$5.00; filing return, .25; continuance, .25.....	17.15
1910, October Term—Transfer, \$1.00; filing .25; filing briefs on motion, \$5.00; submission, .20; continuance, .25.....	6.70
1911, October Term—Transfer, \$1.00; filing receipts, .75; filing papers, \$4.00; filing briefs, \$5.00; argument, .20; judgment, \$1.00; filing same, .25; recording, .40; mandate, \$5.00; preparing record for printer, etc., \$243.75; cost of printing record, \$356.50; attorney's docket fee, \$20.00; costs and copy, .40.....	638.25
	<hr/> 662.10

Fee Book, page 22,052.

Test: JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

[Endorsed]: #1629. File No. 22,052. Supreme Court of the United States. No. 221. October Term, 1911. Frank H. Waskey vs. J. J. Chambers. Mandate. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 28, 1912. John Sundback, Clerk. By

_____, Deputy. L. Vol. 9, Orders and Judgments, p. 515. C. [27]

[Minutes of Court—September 2, 1912.]

*In the District Court for the District of Alaska,
Second Division.*

TERM MINUTES, Special August, 1912, Term,
Beginning August 15, 1912.

Monday, September 2, 1912, at 10 A. M.

Court convened pursuant to adjournment, Hon.
THOMAS R. LYONS, District Judge, presiding.

Upon the convening of court the following proceedings were had:

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1629.

J. J. CHAMBERS

vs.

ANDREW EADIE et al.

Mr. Ira D. Orton, on behalf of defendant Frank Waskey, presented and filed motion to tax costs on appeal and affidavit in support of said motion. Thereupon the Court made an order shortening the time for hearing of said motion, setting the hearing thereof for 10 A. M. to-morrow.

Thereupon Mr. Ira D. Orton, on behalf of defendant Waskey, presented petition for an order directed to J. J. Cole and plaintiff J. J. Chambers to show cause why certain moneys now in the hands of said J. J. Cole should not be paid into the Registry of the Court. Petition filed. Order granted.

Thereupon the Court signed an order, directed to said J. J. Cole and said J. J. Chambers, to show cause as aforesaid and fixed the hearing thereof for 2 P. M. tomorrow. Order filed.

[28]

**[Petition of Frank H. Waskey for Order Directing
Payment of Moneys Into Registry of Court,
etc.]**

*In the District Court for the District of Alaska,
Second Division.*

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

Comes now, Frank H. Waskey, one of the defendants in the above-entitled action, and shows to the Court as follows:

1.

That heretofore, to wit, and prior to the trial of the above-entitled action, a certain stipulation was entered into between the plaintiff above named and the defendants, wherein and whereby it was stipulated and agreed that in lieu of the issuance of an injunction *pendente lite* twenty-five per cent of the gross output of the premises in controversy in this action be placed in escrow with the Miners & Merchants' Bank, at Nome, Alaska, to await the final

2.

That in pursuance to said stipulation and agreement there was prior to the trial of the above-entitled action deposited with said Miners & Merchants' Bank, by the defendants herein, gold of the value of over Fourteen Thousand Dollars. [29]

3.

That after the deposit of said gold-dust and before the trial of the above-entitled action, upon stipulation of the parties hereto, the Court made and entered an order herein as follows:

“On reading and filing the foregoing stipulation, it is hereby ordered that the Miners & Merchants' Bank of Alaska, be authorized to cause the gold-dust deposited with it subject to the order of the court in this action, to be melted, assayed and shipped to the Assay Office in Seattle, Washington, and said bank is hereby directed to hold the proceeds thereof, less the usual charges, subject to the order of the court.”

That pursuant to said order the said Miners & Merchants' Bank of Alaska, did, prior to the entry of judgment in this action, melt, assay and ship said gold-dust to the Assay Office, in Seattle, and thereafter held the proceeds thereof amounting to more than Fourteen Thousand Dollars, subject to the order of the Court in this action.

4.

That thereafter the above-entitled action came on for trial, and such proceedings therein were had that a judgment therein was rendered in favor of the

plaintiff and against the defendants, which said judgment, among other things, provided that the plaintiff, J. J. Chambers, have and recover of and from the defendants, Andrew Eadie, J. Potter Whittren, and Frank H. Waskey, and each of them, the sum of \$20,441.83, and costs and disbursements of action.

The said judgment further provided that the Miners & Merchants' Bank of Alaska, pay into the registry of this Court to the Clerk thereof, to be applied on the foregoing judgment, the proceeds of the gold-dust melted and assayed under the order of the Court, and that execution might issue to carry said judgment into effect.

5.

That thereafter the enforcement of said judgment [30] was by the defendants herein, duly superseded by the execution of a good and sufficient supersedeas bond in due form, and said cause was removed into the United States Circuit Court of Appeals for the Ninth Circuit, by writ of error.

That thereafter on the 6th day of July, 1909, the said United States Circuit Court of Appeals for the Ninth Circuit made and entered its judgment, affirming the judgment of said District Court in this action, and a Mandate was thereafter duly issued out of said United States Circuit Court of Appeals affirming said judgment and duly filed in this Court.

6.

That thereafter, and prior to the issuance of a certain Writ of Certiorari hereinafter referred to, the said Miners & Merchants' Bank of Alaska, pur-

suant to said judgment and order of this Court, duly paid over and delivered to the Clerk of this Court the proceeds of said gold-dust, and the same was thereupon deposited in the registry of this Court, and thereupon an execution was duly issued on said judgment and pursuant to said execution and said order of this Court, the whole of said proceeds were paid over and delivered to one, J. J. Cole, upon the written order of the plaintiff, Chambers, who duly receipted for the same.

7.

That the said J. J. Cole, now has in his possession, as your petitioner is informed and verily believes, the identical fund, so paid to him as aforesaid, or a large portion thereof, amounting, as petitioner is informed and believes, to \$11,106, more or less.

That said J. J. Cole, is a resident of the City of Nome, District of Alaska, being Manager of the Miners and Merchants' Bank of Alaska, and is now within the jurisdiction of this Honorable Court, and said J. J. Cole is still holding [31] said part of said fund as the trustee for Dr. Chambers under an express trust.

8.

That after the proceeds of said gold had been so paid over to the said J. J. Cole, such proceedings were had in the Supreme Court of the United States, that this cause was removed to the Supreme Court of the United States by writ of certiorari, and thereafter on the 13th day of May, 1912, the said Supreme Court of the United States, made and entered its judgment reversing this cause and remanding the

same to this Court for further proceedings not inconsistent with the judgment and opinion of said Supreme Court, and the Mandate of said Supreme Court so reversing and remanding said cause was filed in this Court on the 28th day of August, 1912.

9.

That this defendant is advised and believes that he is entitled to an order forthwith ordering and directing the said J. J. Cole, to pay over and deliver said money so received by him from the Registry of this Court, back into said Registry to await the final determination of this action, and to be held subject to the order of this Court.

WHEREFORE, this defendant prays that an order be made directing the said J. J. Cole, and the said plaintiff, J. J. Chambers, to show cause, if any they have, at a convenient time to be fixed by the Court, why the said J. J. Cole, should not forthwith pay over and deliver to the Clerk of this Court, to be deposited in the registry of the Court said sum of money so received by the said J. J. Cole, or such part thereof as may still be in his possession.

IRA D. ORTON,

Attorney for Defendant, Frank H. Waskey. [32]

United States of America,
District of Alaska,—ss.

Ira D. Orton, being first duly sworn, deposes and says:

That he is the attorney for Frank H. Waskey, one of the defendants in the above-entitled action; that he has read the above and foregoing petition, and

the same is true as he verily believes.

IRA D. ORTON.

Subscribed and sworn to before me this 2d day of September, 1912.

[Court Seal]

J. SUNDBACK,

Clerk of the District Court, District of Alaska, Second Division.

[Endorsed]: #1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Frank H. Waskey et al., Defendant. Petition. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 2, 1912. John Sundback, Clerk. By J. A. B., Deputy. Ira D. Orton, Attorney for Deft. Waskey. [33]

*In the District Court for the District of Alaska,
Second Division.*

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

Order to Show Cause.

On reading and filing the foregoing petition of Frank H. Waskey, one of the defendants in the above-entitled action,

IT IS HEREBY ORDERED that the plaintiff, J. J. Chambers, and one, J. J. Cole, mentioned in said petition, show cause, if any they have, at the court-

room of this Court, in the Town of Nome, Alaska, on the 3d day of September, 1912, at the hour of 2 o'clock P. M. of said day, why an order should not be entered herein, directing the said J. J. Cole, to forthwith pay over and deliver to the Clerk of this Court, to be deposited in the registry of this Court, a certain sum of money, amounting to Eleven Thousand One Hundred and Six Dollars, more or less, alleged in said petition to still be in his possession and to be a portion of the funds formerly in the Registry of this Court in the above-entitled action and subject to the order of the Court;

IT IS FURTHER ORDERED that this order to show cause be forthwith served on said J. J. Cole and said plaintiff, J. J. Chambers, together with a copy of said verified petition, by delivering to said plaintiff, J. J. Chambers, and to said J. J. Cole, true copies of said order to show cause and said petition. [34]

Dated at Nome, Alaska, this 2d day of September, 1912.

THOMAS R. LYONS,
U. S. District Judge.

[Endorsed]: #1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Frank H. Waskey et al., Defendant. Order to Show Cause. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 2, 1912. John Sundback, Clerk. By J. A. B., Deputy. Ira D. Orton, Attorney for Deft. Waskey. Vol. 9. Orders and Judgments, p. 518. C. [35]

[Minutes of Court—September 3, 1912.]

*In the District Court for the District of Alaska,
Second Division.*

TERM MINUTES, Special August, 1912, Term,
Beginning August 15, 1912.

Tuesday, September 3, 1912, at 10 A. M.

Court convened pursuant to adjournment, Hon.
THOMAS R. LYONS, District Judge, Presiding.

Upon the convening of Court the following proceedings were had:

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1629.

CHAMBERS

vs.

EADIE et al.

The hearing on the order to show cause set for hearing at this hour coming on regularly, Mr. Ira D. Orton and Mr. Albert Fink appeared for the petitioner, Mr. G. J. Lomen and Mr. William A. Gilmore appeared for the respondent and intervenors, the plaintiff J. J. Chambers appearing in person.

Thereupon Mr. William A. Gilmore, on behalf of respondent J. J. Cole filed a demurrer to the petition. After argument the demurrer was overruled by the Court. Exception allowed. Upon motion of Mr. Ira D. Orton the petitioner was allowed to amend the petition by interlineation.

Thereupon the answer of respondent J. J. Cole to petition was filed; also answer of intervenor William A. Gilmore to petition was filed.

Thereupon the plaintiff J. J. Chambers orally consented to the restitution of the fund, as prayed for in the petition, but denied some of the matters set forth in the petition. For the purposes of the hearing replies were deemed to have been filed to the answers of J. J. Cole and William A. Gilmore. J. J. Cole, a witness on behalf of petitioner, was called, sworn, and testified.

A certificate of deposit of the Miners & Merchants' Bank, No. 20998, was admitted in evidence, without objection, read in evidence, and marked Exhibit "A."

A certificate of deposit of the Miners & Merchants' Bank, No. 11321, was admitted in evidence, without objection, read in evidence, and marked Exhibit "B."

An assay certificate, No. 1052, of the Miners & Merchants' Bank, was admitted in evidence, without objection, read in evidence and marked Exhibit "C."

Petitioner thereupon admitted orally certain matters contained in the answers of J. J. Cole and William A. Gilmore, and denied certain other matters.

William A. Gilmore was called, sworn and testified on behalf of petitioner.

Petitioner rests.

Mr. William A. Gilmore, on behalf of respondent and intervenors, read in evidence, without objection, partial satisfaction of judgment in this cause, 1629, Chambers vs. Eadie et al., as the same appears on page 40, Volume 2, Judgment Docket of this Court; said satisfaction of judgment to be considered as Re-

spondent's Exhibit No. 1.

The mandate of the Circuit Court of Appeals filed in this Court on October 28, 1909, was admitted in evidence, without objection, and marked Respondent's Exhibit No. 2.

The order of this Court of October 29, 1909, to pay over certain moneys to the plaintiff herein was admitted in evidence, without objection, and marked Respondent's Exhibit No. 3. Ira D. Orton and J. J. Chambers were each called, sworn and testified on behalf of respondent. [36]

*In the District Court for the District of Alaska,
Second Division.*

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE et al.,

Defendants.

Demurrer to Petition of Frank H. Waskey.

Comes now J. J. Cole named in the petition of Frank H. Waskey, and appearing specially for the purpose of this demurrer, alleges:

That it appears upon the face of the said petition that the Court has no jurisdiction of the person of said J. J. Cole or the subject of the matter mentioned in said petition, and that the Court is without jurisdiction to hear and determine the matter or grant the relief prayed for in said petition.

G. J. LOMEN and

WILLIAM A. GILMORE,

Attorneys for said J. J. Cole.

[Endorsed]: No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Demurrer to Petition of Frank H. Waskey. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 3, 1912. John Sundback, Clerk. By J. A. B., Deputy. William A. Gilmore, Attorney at Law, Nome, Alaska. Attorney for ————. [37]

*In the District Court for the District of Alaska,
Second Division.*

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE et al.,

Defendants.

Answer of J. J. Cole to Petition of Frank H. Waskey.

Comes now J. J. Cole, mentioned in the petition of defendant Frank H. Waskey, and cited in the order to show cause filed therewith, and for answer to said petition, alleges as follows:

I.

Admits paragraph I of said petition.

II.

Admits the allegations of paragraph II, but alleges that the total amount of gold deposited with the Miners & Merchants' Bank was \$14,484.30.

III.

Answering paragraph III he alleges that the sum of \$14,484.30 was deposited in the Miners & Merchants' Bank the proceeds of bullion theretofore deposited and converted into a certificate of deposit payable to the order of the U. S. District Court.

IV.

He admits the allegations of paragraph IV. [38]

V.

He admits the allegations of paragraph V.

VI.

He denies each and every allegation, matter and thing contained in paragraph VI, and the whole thereof.

VII.

He denies the allegations of paragraph VII save and except that he has in his possession as trustee, as hereinafter alleged, the sum of Eleven Thousand One Hundred and Six Dollars belonging to the plaintiff, J. J. Chambers, and subject to claims as hereinafter alleged; and admits that he is a resident of the City of Nome, and manager of the Miners & Merchants' Bank, and within the jurisdiction of the Court.

VIII.

Answer paragraph VIII he admits the proceedings were had as therein alleged, but denies every other allegation therein contained.

IX.

As to the allegations contained in paragraph IX of said petition, the answering defendant alleges that he has no knowledge or information sufficient to form

a belief as to whether Frank H. Waskey is entitled to the moneys therein mentioned, or any part thereof, or to any order of said Court in the premises, and he therefore denies the same.

And for an affirmative defense to the petition of said defendant, Frank H. Waskey, and in response to the order directing him to show cause to the Court why an order should not be entered herein directing him to forthwith pay over and deliver to the Clerk of the Court, the money now held by him as trustee, this answering defendant alleges as follows: [39]

That on the 11th day of June, 1909, this answering defendant at the request of the plaintiff, J. J. Chambers and certain other parties to wit: J. S. McIntosh, John J. Meyers, W. J. Rowe and Wm. McManus, agreed to become trustee to hold certain property in trust for the use and benefit of the said parties, and thereupon a certain written agreement was entered into between the said J. J. Chambers and this answering defendant, a copy of which is hereunto annexed, marked Exhibit "A" and made a part hereof. That at the same time and as part of the same transaction, the said plaintiff, J. J. Chambers, executed and delivered to this answering defendant, as trustee, a quitclaim deed, a copy of which is marked Exhibit "B" and made a part hereof; that on and prior to the 29th day of October, 1909, the Miners & Merchants' Bank was custodian under certain stipulations in the above entitled action, of the sum of \$14,484.30, the proceeds of certain gold-dust received under said stipulations in the above-entitled action, and the same was evidenced by a certificate

of deposit payable to the order of the U. S. District Court; that on the said 29th day of October, 1909, this answering defendant was the manager of said Miners & Merchants' Bank, and on said date William A. Gilmore, Esq., as attorney for the plaintiff, J. J. Chambers, in the above-entitled action, presented to the Miners & Merchants' Bank a certain written order of the above-entitled Court, a copy of which said order is hereto annexed marked Exhibit "C" and made a part hereof; that upon presentation of said order, the said Miners & Merchants' Bank cancelled the said certificate of deposit and said money was placed to the credit of the plaintiff J. J. Chambers; that thereafter the said Chambers deposited with this answering defendant, as said trustee, for the said bondsmen above named, the sum of \$11,-106.00 which said money was the property of the said plaintiff, J. J. Chambers, as this answering defendant is informed and believes, and this answering [40] defendant now holds the same as trustee under the terms and conditions of the said trust agreement above set forth, and subject to the attachments and garnishments hereinafter mentioned; that since said time this answering defendant has been garnished by a writ of garnishment issued in the case of William A. Gilmore, plaintiff, vs. J. J. Chambers, defendant, and has answered in said garnishment proceedings and is also holding the said funds subject to said garnishment; that since said time this answering defendant has also been garnished in the case of Cornelius D. Murane, plaintiff, vs. J. J. Chambers, defendant, and has answered said

garnishment proceedings, and is holding the said funds subject to said garnishment; that since said time this answering defendant has also been further garnished under a writ of garnishment issued in the case of Ira D. Orton, plaintiff, vs. J. J. Chambers, Defendant, and has answered in said garnishment proceedings and is holding the said funds subject to said garnishment.

That all of the said attachments and garnishments were made under process of the above-entitled court.

That all of the said money in the possession of this answering defendant belonging to the said J. J. Chambers is held in trust under the terms of said trust agreement, and subject to all of the said garnishments and were all so held prior to the service upon this answering defendant of the order to show cause herein.

J. J. COLE, Trustee,
Answering Defendant.

G. J. LOMEN,
Attorney for Answering Defendant. [41]

United States of America,
District of Alaska,—ss.

J. J. Cole, being first duly sworn, deposes and says:

That he is the answering defendant above named; that he has read the above and foregoing answer to the petition of Frank H. Waskey, knows the contents thereof and the same is true as he verily believes.

J. J. COLE.

Subscribed and sworn to before me this 3d day of September, A. D. 1912.

[Notarial Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

[42]

Exhibit "A" [to Answer of J. J. Cole to Petition of Frank H. Waskey—Agreement, Dated June 11, 1909, J. J. Cole and J. J. Chambers.]

MEMORANDUM OF AGREEMENT made and entered into this 11th day of June, 1909, by and between J. J. COLE, of Nome, Alaska, party of the first part, and J. J. CHAMBERS, of the same place, party of the second part;

WITNESSETH, that

WHEREAS, the party of the second part has given an undertaking in the sum of twenty-five thousand (25,000) dollars in the case of J. J. Chambers, plaintiff, vs. C. V. La Farge et al., defendants, in the District Court of the District of Alaska, Second Division, with himself as principal and J. S. MacIntosh, John J. Meyer, W. J. Rowe, Wm. McManus, as sureties on said undertaking; and

WHEREAS, the party of the second part has this day executed a quitclaim deed of trust of an undivided one-half ($\frac{1}{2}$) interest in those two (2) certain mining claims known as No. 5 $\frac{1}{2}$ Little Creek and the Bon Voyage mining claim, situated in the Cape Nome Recording District, District of Alaska, to the party of the first part herein; and

WHEREAS, it is the desire and the intention of the parties hereto that the said party of the first part

shall hold the title of the said two (2) claims, together with the rents, issues and profits arising from the operation of both of said claims in trust in indemnity of such securities above named on said undertaking, and it is the desire and intention of the said parties hereto to evidence said trust in writing.

NOW, THEREFORE, for and in consideration of the mutual promises herein expressed, and other considerations,

IT IS HEREBY MUTUALLY AGREED, that the party of the second part shall deliver the said deed to the party of the first part, and the said party of the first part shall hold the [43] same in escrow, in trust, as indemnity to said securities, and upon the cancellation of the said undertaking said party of the first part agrees to re-deliver the said deed to the party of the second part, or reconvey the same, upon demand, without any other consideration.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals the day and year above written.

J. J. COLE. [Seal]

J. J. CHAMBERS. [Seal]

Signed, sealed and delivered in the presence of:

WILLIAM A. GILMORE,

C. G. COWDEN.

United States of America,

District of Alaska,—ss.

THIS IS TO CERTIFY THAT ON THIS 11th day of June, 1909, before me, the undersigned, a Notary Public in and for the District of Alaska, personally appeared the within named J. J. Cole and

J. J. Chambers, who executed the foregoing instrument, and who each acknowledged to me that he executed the same freely and voluntarily, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year above written.

[Seal]

WILLIAM A. GILMORE,
Notary Public in and for the District of Alaska,
Residing at Nome. [44]

Exhibit "B" [to Answer of J. J. Cole to Petition of Frank H. Waskey—Deed, Dated June 11, 1909, J. J. Chambers and J. J. Cole, etc.]

THIS INDENTURE, made and entered into this 11th day of June, 1909, by and between J. J. Chambers of Nome, Alaska, party of the first part, and J. J. Cole, trustee of the same place, party of the second part,

WITNESSETH, that the said party of the first part, for and in consideration of the sum of one (1) dollar and other good and sufficient considerations to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm, and quit-claim unto the said party of the second part, and to his heirs and assigns forever, all of the right, title, interest and estate of the party of the first part in and to the following described property:

An undivided one-half ($\frac{1}{2}$) interest in and to that certain placer mining claim known and designated as

No. 5½ Little Creek, a tributary of Anvil Creek, in the Cape Nome Recording District, District of Alaska, said claim being a bench claim, adjoining on the east side of No. 5 Below on said Little Creek;

Also, an undivided one-half (1½) interest in and to that certain placer mining claim known and designated as the BON VOYAGE situated and located about fifteen hundred (1500) feet in a southerly direction from No. 3 Below on Newton Gulch, a tributary of Dry Creek, in the said Cape Nome Recording District, District of Alaska.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all judgments, rents, issues, and profits therefrom, and all damages appertaining thereto, now of record, or otherwise.

TO HAVE AND TO HOLD, all and singular, the said premises, [45] together with the appurtenances, unto the said party of the second part, his heirs and assigns, as Trustee, in accordance with a memorandum of agreement of even date herewith, expressing the terms of said trust.

IN WITNESS WHEREOF, the said party of the first party has hereunto set his hand and seal the day and year above written.

J. J. CHAMBERS. (Seal)

Signed, sealed and delivered in presence of:

WILLIAM A. GILMORE.

C. G. COWDEN.

United States of America,
District of Alaska,—ss.

THIS IS TO CERTIFY, that on this 11th day of June, 1909, before me the undersigned, a Notary Public in and for the District of Alaska, personally appeared the within named J. J. CHAMBERS, who executed the foregoing instrument, and acknowledged to me that he executed the same freely and voluntarily, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year above written.

[Seal] WILLIAM GILMORE,
Notary Public in and for District of Alaska, Residing at Nome. [46]

Exhibit "C" [to Answer of J. J. Cole to Petition of Frank H. Waskey—Order Directing Miners & Merchants' Bank of Nome to Pay Plaintiff Certain Money, etc.]

In the District Court for the District of Alaska, Second Division.

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

This matter coming on for hearing this 29th day of October, 1909, upon the application of plaintiff for an order directing the Miners & Merchants' Bank of Nome, Alaska, to pay to the plaintiff all moneys received and held by it from the gold-dust taken from the Bon Voyage Placer Claim, the claim in controversy in the above-entitled action, to apply on the plaintiff's judgment in the above-entitled action; and it appearing to the Court from the records and files of this case that certain amounts of gold-dust were heretofore deposited with the Miners & Merchants' Bank, of Nome, Alaska, and subsequently by order of this Court reduced to money and held by said Miners & Merchants' Bank, subject to the further order or orders of this Court in this action; and, it further appearing to the Court from the records of the case that on the 12th day of October, 1907, a judgment was entered in this case, decreeing and directing the said Miners & Merchants' Bank to pay the said money so held to the plaintiff to apply upon said judgment, and that thereafter a stay of execution was granted in the above-entitled action, staying the payment of the same; and, it further appearing to the Court that on the 28th day [47] of October, 1909, the mandate of the Circuit Court of Appeals for the Ninth Circuit has been duly filed with the Clerk of the above-entitled court, affirming the said judgment and decree of October 12th, 1907; and, it further appearing to the Court that plaintiff is entitled to the said money now held by said Miners & Merchants' Bank under the stipulations and orders heretofore signed and filed in this action; and the

Court being otherwise fully advised in the premises:

NOW ORDERS AND DIRECTS that said Miners & Merchants' Bank of Nome, Alaska, pay to the plaintiff to apply on the said judgment all sum or sums of money received and held by it under the stipulations and orders of the above-entitled court heretofore signed and filed, said sum or sums of money so to be paid to plaintiff to apply on the said judgment of October 12th, 1907, in this action.

Done in open court, this 29th day of October, 1909.

ALFRED S. MOORE,

District Judge.

[Endorsed]: No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Answer of J. J. Cole to Petition of Frank H. Waskey. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 3, 1912. John Sundback, Clerk. By J. A. B., Deputy. William A. Gilmore, Attorney at Law, Nome, Alaska, Attorney for ————. [48]

In the District Court for the District of Alaska, Second Division.

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE et al.,

Defendants.

**Answer of William A. Gilmore Intervenor, to the
Petition of Defendant Frank H. Waskey.**

Comes now William A. Gilmore, intervenor, and upon leave of Court first had and obtained, files and submits to the Court his answer to the petition of the defendant Frank H. Waskey, as follows:

I.

Admits the allegations of paragraph I.

II.

Answering paragraphs II and III he alleges that there was deposited with the Miners & Merchants' Bank, under stipulation in the above-entitled action, the sum of \$14,484.30 deposited in a certificate of deposit payable to the order of the U. S. District Court.

III.

Admits the allegations of paragraphs IV and V of said petition.

IV.

Answering paragraph VI he denies each and every allegation therein contained and the whole thereof.
[49]

V.

He denies each and every allegation, matter and thing contained in paragraph VII, except that he admits that the said J. J. Cole is a resident of the City of Nome and manager of the Miners & Merchants' Bank, and within the jurisdiction of the Court.

VI.

Answering paragraphs VIII and IX he denies that petitioner is entitled to an order of the Court, or-

dering and directing the said J. J. Cole to pay over and deliver any of the funds or money now in his possession belonging to the plaintiff, into the registry of the Court.

And as an affirmative answer and defense this answering defendant alleges:

I.

That on and prior to the 29th day of October, 1909, the *Merchants & Miners' Bank* of Nome, held in escrow the sum of \$14,484.30 under certain stipulations in the above-entitled action, proceeds of certain gold-dust, which said amount was evidenced by a certificate of deposits payable to the order of the U. S. District Court; that on said 29th day of October, 1909, this answering defendant, as attorney for the plaintiff, J. J. Chambers, procured a certain written order from the judge of the above-entitled court, a copy of said order being annexed as Exhibit "C" to the answer of defendant J. J. Cole herein; and thereafter, on said date, this answering defendant took the said order to the *Miners & Merchants' Bank* at Nome, and presented the same to the bank and thereupon the said bank cancelled said certificate of deposit and paid the said sum of \$14,484.30 to the credit of plaintiff, J. J. Chambers. [50]

II.

That on or about the 11th day of June, 1909, the plaintiff, J. J. Chambers, for the use and benefit of J. S. McIntosh, John J. Meyers, W. J. Rowe and Wm. McManus, sureties on a certain undertaking, entered into an agreement and deed of trust with one J. J. Cole, one of the answering defendants herein,

wherein it was agreed that the said J. J. Cole, as trustee for said bondsmen, should hold certain real property and moneys to secure the payment of any damages that might occur by reason of the giving of said bond; that the said deed and agreement of trust are set out as Exhibits "A" and "B" to answer of said J. J. Cole herein.

III.

That after the said 29th day of October, 1909, the said J. J. Chambers deposited with the said J. J. Cole, as such trustee, the sum of \$11,106.00 and thereafter, on different dates, said J. J. Cole received from the property mentioned in said trust deed several sums of money amounting in all to the sum of over nineteen thousand dollars, all of which said moneys the said J. J. Cole holds under the terms and agreements of said trust.

IV.

That thereafter and on or about the 11th day of March, 1910, this answering defendant caused to be issued a writ of attachment and garnishment in the case of William A. Gilmore, plaintiff, vs. J. J. Chambers, defendant, wherein all of said funds held by the said J. J. Cole as trustee were garnished, and the said J. J. Cole now holds all of said funds subject to the garnishment of this answering defendant in said action. [51]

V.

That thereafter the said funds were again garnished in the case of Cornelius D. Murane, plaintiff, vs. J. J. Chambers, and in the case of Ira D. Orton, plaintiff, vs. J. J. Chambers, defendant, all of said

actions in which said garnishment proceedings were had were in the above-entitled court, and were begun, and the garnishment proceedings had prior to the motion and order to show cause filed herein by petitioner, Frank H. Waskey.

VI.

That if the said money or any part thereof is paid into the registry of the Court, the security of said bondsmen will be impaired and great injustice will occur to the attaching creditors above named; that answering defendant is informed, and knows it to be a fact, that the plaintiff, J. J. Chambers is entitled to a large sum of money from the defendant, Frank H. Waskey, for royalties from the ground in controversy in the above-entitled action, and that the said plaintiff, J. J. Chambers, has succeeded to the right of the defendant Andrew Eadie therein by deed, and has a good and valid defense to any action at law for any claim or demand on behalf of the said Frank H. Waskey, for any and all sums claimed to be due him from the said Chambers.

And for a second affirmative defense and answer to the petition of said Frank H. Waskey, this answering defendant alleges that the Court is without jurisdiction and has not jurisdiction in the above-entitled action to grant the relief prayed for in the motion and petition of said Frank H. Waskey.

WILLIAM A. GILMORE,

Intervenor and Answering Defendant. [52]

United States of America,
District of Alaska,—ss.

William A. Gilmore, being first duly sworn, deposes and says:

That he is the answering defendant named in the above and foregoing answer; that he has read the same and knows the contents thereof and the same is true as he verily believes.

WILLIAM A. GILMORE,

Subscribed and sworn to before me this 3d day of September, A. D. 1912.

[Notarial Seal]

L. W. HAYDEN,

Notary Public in and for the District of Alaska.

[Endorsed]: No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Answer of William A. Gilmore, Intervenor, to the Petition of Defendant Frank W. Waskey. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 3, 1912. John Sundback, Clerk. By J. A. B., Deputy. William A. Gilmore, Attorney at Law, Nome, Alaska, Attorney for ————. [53]

In the District Court for the District of Alaska, Second Division.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE et al.,

Defendants.

Reply of the Defendant Waskey to Answer of J. J. Cole.

Comes now Frank Waskey, one of the defendants in the above-entitled action, and for reply to the answer of J. J. Cole, which said answer was filed herein on the 3d day of September, 1912, admits, denies and alleges:

1.

As to the allegation contained in the affirmative defense of said J. J. Cole,—

“that upon the presentation of said order, the said Miners & Merchants’ Bank, cancelled the said certificate of deposit, and said money was placed to the credit of the plaintiff, J. J. Chambers,”

this defendant denies that upon the cancellation of said certificate of deposit said money was placed to the credit of said J. J. Chambers, and further denies that thereafter the said Chambers deposited the same with said J. J. Cole, as trustee for the bondsmen named in said answer, and denies that said sum of \$11,106.00, was the property of said J. J. Chambers, but in this behalf defendant alleges that when said certificate of deposit was cancelled, the proceeds thereof were immediately placed in a new certificate of deposit, payable to said J. J. Cole, as trustee.

[54]

Defendant Waskey further alleges that said money in the possession of J. J. Cole, as trustee, is not the property of said J. J. Chambers, and as to the attachments referred to in said answer as having been levied on cases entitled William A. Gilmore, Plaintiff,

versus, J. J. Chambers, Defendant, and Cornelius D. Murane, plaintiff, versus, J. J. Chambers, Defendant, defendant alleges that said writs of attachment were issued in certain causes wherein said Gilmore and Murane sued to recover from the said Chambers, attorney fees in this and other actions, and that said Gilmore and Murane at all times had full and complete knowledge of the rights and equities of the defendant in and to said fund of \$11,106.00.

IRA D. ORTON,

ALBERT FINK,

Attorneys for Defendant Waskey.

United States of America,

District of Alaska,—ss.

Ira D. Orton, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant, Frank H. Waskey, in the above-entitled action; that he has read the within and foregoing reply, and believes the same to be true.

IRA D. ORTON.

Subscribed and sworn to before me, this 4th day of September, 1912.

[Notarial Seal]

J. ALLISON BRUNER,

Notary Public, District of Alaska.

[Endorsed]: #1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. F. H. Waskey et al., Defendant. Reply to Answer of J. J. Cole. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 4, 1912. John

Sundback, Clerk. By J. A. B., Deputy. Ira D. Orton, Attorney for Deft. Waskey. [55]

In the District Court, District of Alaska, Second Division.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE et al.,

Defendants.

Reply to the Defendant Waskey to Answer of the Intervenor, William A. Gilmore.

Comes now the defendant, Frank H. Waskey, and for reply to the answer of William A. Gilmore, intervenor herein, admits, denies and alleges:

1.

Replying to paragraph one of the affirmative answer and defense of said William A. Gilmore, the said defendant, Waskey, denies that said Miners & Merchants' Bank upon cancelling the certificate of deposit mentioned in said paragraph, placed said sum of \$14,484.30 to the credit of the plaintiff, J. J. Chambers, but, on the contrary, alleges that upon the cancellation of the said certificate of deposit, a new certificate of deposit was immediately issued in lieu thereof, payable to J. J. Cole, Trustee.

2.

Replying to paragraph 3 of said answer and defense of said intervenor, William A. Gilmore, said defendant Waskey denies that part of said paragraph reading as follows:

“That after the said 29th day of October, 1909, the said J. J. Chambers deposited with the said J. J. Cole, as such trustee, the sum of \$11,106.00,”

but, on the contrary, alleges that said sum of \$11,106.00 was turned over and deposited with said J. J. Cole, by the Miners & Merchants' Bank of Alaska. [56]

As to the other allegations of paragraph 3 of said affirmative answer, defendant Waskey has no knowledge or belief, but has no reason to disbelieve the same.

3.

The said defendant Waskey admits that attachments were issued and levied as alleged in paragraph 4 of said affirmative answer, and in paragraph 5 thereof, but in that behalf defendant Waskey alleges that said William A. Gilmore and said Cornelius D. Murane commenced and prosecuted said suits referred to in said paragraphs against the said J. J. Chambers for attorney fees alleged to be due from the said Chambers to them for services in this and other cases, and that the said Gilmore and said Murane had at all times full and complete knowledge of the rights and equities of the defendant Waskey in and to the funds in controversy.

4.

Replying to paragraph 6 of said affirmative answer and defense, defendant Waskey denies each and every allegation of said paragraph 6.

5.

Replying to the second affirmative defense and an-

swer of said intervenor, William A. Gilmore, defendant Waskey denies each and every allegation thereof.

IRA D. ORTON,

ALBERT FINK,

Attorneys for Defendant Waskey. [57]

United States of America,

District of Alaska,—ss.

Ira D. Orton, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant, Frank H. Waskey, in the above-entitled action; that he has read the within and foregoing reply and believes the same to be true.

IRA D. ORTON.

Subscribed and sworn to before me this 4th day of September, 1912.

[Notarial Seal]

J. ALLISON BRUNER,

Notary Public, District of Alaska.

[Endorsed]: #1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Frank H. Waskey et al., Defendant. Reply to Answer of Intervenor William A. Gilmore. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 4, 1912. John Sundback, Clerk. By J. A. B., Deputy. Ira D. Orton, Attorney for Deft. Waskey. [58]

[**Minutes of Court—September 4, 1912.**]

In the District Court for the District of Alaska, Second Division.

TERM MINUTES, Special August, 1912, Term,
Beginning August 15, 1912.

Wednesday, September 4, 1912, at 10 A. M.

Court convened pursuant to adjournment, Hon.
THOMAS R. LYONS, District Judge, presiding.

Upon the convening of court the following proceedings were had:

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1629.

CHAMBERS

vs.

EADIE et al.

Upon motion of Mr. Gilmore the stipulation and order of October —, 1906, providing that the gold-dust should be deposited in the Miners & Merchants' Bank were considered read in evidence, to be marked Respondent's and Intervenor's Exhibits Nos. 4 and 5.

This closing the testimony, argument was made by the attorneys for the respective parties. At the close of the argument, Mr. William A. Gilmore, on behalf of himself as intervenor, was granted leave to introduce further testimony.

Thereupon court adjourned until 2 P. M. to-day.

2 P. M.

1629.

CHAMBERS

vs.

EADIE et al.

Upon motion of Mr. William A. Gilmore, the hearing on the order to show cause was reopened without objection, on the part of petitioner.

William A. Gilmore was recalled on behalf of intervenor. A writ of attachment, filed April 2, 1910, in cause No. 2154, Gilmore vs. Chambers, was admitted in evidence, without objection, and marked Respondent's and Intervenor's Exhibit No. 6. An alias writ of attachment in cause No. 2154, Gilmore vs. Chambers, was admitted in evidence, without objection, and marked Respondent's and Intervenor's Exhibit No. 7. Mandate of the Circuit Court of Appeals, filed in this court, August 23, 1912, in the case of Gilmore vs. Chambers, No. 2154, was considered read in evidence; also the execution issued in cause No. 2154, Gilmore vs. Chambers, on August 30, 1912, was considered read in evidence.

The minutes of the Court in cause No. 2154, Gilmore vs. Chambers, found on page 571, Volume 13, Journal of this Court, were in evidence, without objection.

Mr. G. J. Lomen, on behalf of respondent, offered in evidence Judgment in cause No. 2375, Murane vs. Chambers, which was admitted in evidence, without objection, and marked Respondent's Exhibit No. 8.

This closing the evidence in the case, the matter was submitted to the Court for its decision. [59]

In the District Court for the District of Alaska, Second Division.

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

W. A. GILMORE,

Intervenor.

J. J. COLE,

Trustee.

Findings of Fact and Conclusions of Law.

This matter having come on for hearing on the petition of Frank H. Waskey, one of the defendants herein, for an order directing J. J. Cole to show cause why the said Cole should not pay over and deliver to the Clerk of this Court, to be deposited in the registry of the court, the sum of Eleven Thousand One Hundred and Six Dollars now held by the said Cole as trustee for the plaintiff herein; and the Court having heretofore issued an order requiring the said Cole on the 3d day of September, 1912, at the courthouse in Nome, Alaska, to appear and show cause why he should not be required to pay the sum of Eleven Thousand One Hundred and Six Dollars, which he then and there held as trustee for the plain-

tiff herein, to the Clerk of this Court to be held in the registry of the court until the final determination of this action; and the said J. J. Cole having appeared on said day and answered said order to show cause; and W. A. Gilmore having also appeared and answered said petition; and the Court thereafter having heard the testimony of said petitioner, said J. J. Cole and said intervenor; and having heard argument of counsel, and having thereafter taken the said matter under advisement; and the Court, being now fully advised in the premises, finds: [60]

FINDINGS OF FACT.

That under and by virtue of the stipulation made by the parties in the above-entitled action the sum of Fourteen Thousand Four Hundred and Eighty-four Dollars and Thirty Cents, in gold-dust, was paid into the registry of the Court, to be held there until the final determination of the action;

That thereafter, by order of this Court based upon a stipulation of all of the parties to this action, the said gold-dust was thereafter delivered to the Miners & Merchants' Bank of Nome, Alaska, and the said Miners & Merchants' Bank was authorized by an order of this Court to ship the same to the assay office at Seattle, Washington, for the purpose of reducing the same to its actual money value;

That thereafter, and in accordance with said order, the said Miners & Merchants' Bank at Nome, Alaska, gave its certificate of deposit to the District Court for said sum, to wit: Fourteen Thousand Four Hundred and Eighty-four Dollars and Thirty Cents, the same being the money value of said gold-dust.

That thereafter the plaintiff herein procured judgment in this cause against the defendants, and each of them, for a certain interest in the mining claim in controversy, known as the Bon Voyage, and also a money judgment against the defendants, and each of them, for the sum of Twenty Thousand, Four Hundred and Forty-one Dollars and Eighty-three Cents, which judgment provided that the said money in the possession of said Miners & Merchants' Bank be applied on said judgment;

That thereafter the defendants herein duly prosecuted a writ of error from said judgment to the Circuit Court of Appeals for the Ninth Circuit, and filed their supersedeas bond for the purpose of staying execution of said judgment;

That thereafter, and in July, 1909, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of this Court; [61]

That thereafter, and before any certiorari proceedings had been prosecuted by the defendants from the judgment of said Circuit Court of Appeals for the Ninth Circuit to the Supreme Court of the United States, the plaintiff herein enforced the payment of a certain portion of said judgment by having said fund in the Miners & Merchants' Bank applied on said judgment;

That thereafter the plaintiff herein used, for the payment of certain debts of his, a certain portion of said fund so collected and deposited the remainder with the said J. J. Cole as his trustee and directed the said J. J. Cole to hold the same as plaintiff's trustee for the purpose of securing certain persons who

had signed a bond, with the plaintiff herein, as sureties in another action entitled *Chambers v. LaFarge, et al.*;

That thereafter the defendants herein prosecuted certiorari proceedings from the said judgment of the Circuit Court of Appeals for the Ninth Circuit and procured a reversal of the judgment of that court and the judgment of this Court in this cause;

That the Supreme Court of the United States after reversing said cause, remanded the same to this Court for a new trial;

That after the affirmance of the judgment of this Court in this cause by the Circuit Court of Appeals for the Ninth Circuit, and before the same was reversed by the Supreme Court of the United States, the intervenor herein commenced an action in this Court against the plaintiff herein and sued out a writ of attachment and garnished all of said fund in the hands of said J. J. Cole;

That the principal portion of the claim upon which the said intervenor based said action against the plaintiff herein was for compensation claimed to be due said intervenor from the plaintiff by reason of services rendered to the plaintiff by the intervenor as counsel for the plaintiff in this action; [62]

That at the time of the bringing of said action by the intervenor against the plaintiff and the garnishing of said fund in said action the said intervenor had full knowledge of the contingent equity which the defendants, and each of them, had in the particular fund so garnished.

Upon the foregoing Findings of Fact, the Court concludes as matter of law:

CONCLUSIONS OF LAW.

That the petitioner herein is entitled as against the trustee, the intervenor, and the persons who signed the bond with the plaintiff as principal, in the case of Chambers v. LaFarge, et al., to an order requiring the said trustee to pay the said fund of Eleven Thousand One Hundred and Six Dollars into the registry of the Court to abide the determination of this action, or the further order of this Court.

Done in open Court at Ketchikan, Alaska, October 15, 1912.

THOMAS R. LYONS,
Judge of the District Court.

[Endorsed]: No. 1629. In the District Court of the United States for the Div. No. 2 of Alaska. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. W. A. Gilmore, Intervenor. J. J. Cole, Trustee. Findings of Fact and Conclusions of Law. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Dec. 20, 1912. John Sundback, Clerk. By —————, Deputy. L. Vol. 10. Orders and Judgments, p. 60. C. [63]

In the District Court for the District of Alaska, Second Division.

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

W. A. GILMORE,

Intervenor.

J. J. COLE,

Trustee.

Opinion.

This is a petition by Frank H. Waskey, one of the defendants in the above-entitled action, for restitution of certain moneys collected by the plaintiff herein under and by virtue of a judgment rendered heretofore in this cause by this Court which was subsequently reversed by the Supreme Court of the United States.

The verified petition, among other things, alleges: That heretofore, to wit, and prior to the trial of the above-entitled action, a certain stipulation was entered into between the plaintiff above named and the defendants, wherein and whereby it was stipulated and agreed that in lieu of the issuance of an injunction *pendente lite* twenty-five per cent of the gross output of the premises in controversy in this

action be placed in escrow with the Miners & Merchants' Bank, at Nome, Alaska, to await the final judgment of the Court herein; that in pursuance to said stipulation and agreement there was prior to the trial of the above-entitled action deposited with said Miners & Merchants' Bank, by the defendants herein, gold of the value of over Fourteen Thousand Dollars; that after the deposit of said gold-dust and before the trial of the above-entitled action, upon stipulation of the parties hereto, the Court made [64] and entered an order herein as follows:

“On reading and filing the foregoing stipulation, it is hereby ordered that the Miners & Merchants' Bank of Alaska, be authorized to cause the gold-dust deposited with it subject to the order of the court in this action, to be melted, assayed and shipped to the assay office in Seattle, Washington, and said bank is hereby directed to hold the proceeds thereof, less the usual charges, subject to the order of the court.”

That pursuant to said order the said Miners & Merchants' Bank of Alaska, did, prior to the entry of judgment in this action, melt, assay and ship said gold-dust to the assay office, in Seattle, and thereafter held the proceeds thereof amounting to more than Fourteen Thousand Dollars, subject to the order of the Court in this action; that thereafter the above-entitled action came on for trial, and such proceedings therein were had that a judgment therein was rendered in favor of the plaintiff and against the defendants, which said judgment, among other things, provided that the plaintiff, J. J. Chambers,

have and recover of and from the defendants, Andrew Eadie, J. Potter Whittren, and Frank H. Waskey, and each of them, the sum of Twenty Thousand Four Hundred and Forty-one Dollars and Eighty-three Cents, and costs and disbursements of action; the said judgment further provided that the Miners & Merchants' Bank of Alaska pay into the registry of this court to the Clerk thereof, to be applied on the foregoing judgment, the proceeds of the gold-dust melted and assayed under the order of the Court, and that execution might issue to carry said judgment into effect; that thereafter the enforcement of said judgment was, by the defendants herein, duly superseded by the execution of a good and sufficient supersedeas bond in due form, and said cause was removed into the United States Circuit Court of Appeals for the Ninth Circuit, by writ of error; that thereafter on the 6th day of July, 1909, the said United States Circuit Court of Appeals for the Ninth Circuit made and entered its judgment, affirming the judgment of said District Court in [65] this action, and a mandate was thereafter duly issued out of said United States Circuit Court of Appeals affirming said judgment and duly filed in this Court; that thereafter, and prior to the issuance of a certain writ of certiorari hereinafter referred to, the said Miners & Merchants' Bank of Alaska, pursuant to said judgment and order of this Court, duly paid over and delivered to the Clerk of this Court the proceeds of said gold-dust, and the same was thereupon deposited in the registry of this Court, and thereupon an execution was duly issued

on said judgment and, pursuant to said execution and said order of this Court, the whole of said proceeds were paid over and delivered to one J. J. Cole upon the written order of the plaintiff, Chambers, who duly receipted for the same; that the said J. J. Cole now has in his possession, as your petitioner is informed and verily believes, the identical fund, so paid to him as aforesaid, or a large portion thereof, amounting, as petitioner is informed and believes, to Eleven Thousand, One Hundred and Six Dollars, more or less; that said J. J. Cole is a resident of the city of Nome, District of Alaska, being manager of the Miners & Merchants' Bank of Alaska, and is now within the jurisdiction of this Honorable Court, and said J. J. Cole is still holding said part of said fund as the trustee for said Chambers under an express trust; that after the proceeds of said gold had been so paid over to the said J. J. Cole, such proceedings were had in the Supreme Court of the United States that this cause was removed to the Supreme Court of the United States by writ of certiorari, and thereafter on the 13th day of May, 1912, the said Supreme Court of the United States made and entered its judgment reversing this cause and remanding the same to this Court for further proceedings not inconsistent with the judgment and opinion of said Supreme Court, and the mandate of said Supreme Court so reversing and remanding said cause was filed in this court on the 28th [66] day of August, 1912; that this defendant is advised and believes that he is entitled to an order forthwith ordering and directing the said J. J. Cole to pay over

and deliver said money so received by him from the registry of this court, back into said registry to await the final determination of this action, and to be held subject to the order of this Court.

To the petition said J. J. Cole answered admitting substantially all the allegations of the petition excepting that after the bullion had been converted into money it was ever paid into the registry of the Court; but, on the contrary, alleging that the same was paid over under the judgment entered in said cause in this court to the plaintiff herein; and further alleging that all of said money was thereafter deposited by the plaintiff with said Cole as trustee to be held by him as such trustee to protect certain sureties who had executed an injunctional bond as sureties in another action wherein plaintiff herein was plaintiff. Said answer further alleges that said sum, together with other property, has been heretofore attached and garnished by garnishment proceedings in two actions, one by W. A. Gilmore against the plaintiff herein, and the other by C. D. Murane against the plaintiff herein.

The intervenor, W. A. Gilmore, filed an answer in intervention to the petition of Waskey, which is substantially identical with the answer of J. J. Cole.

APPEARANCES.

J. J. CHAMBERS, Plaintiff, *in propria persona*;

IRA D. ORTON and ALBERT FINK, for the Defendants;

W. A. GILMORE, Intervenor, *in propria persona*;

W. A. GILMORE, for J. J. Cole, Trustee.

L. G. LOMAN, for C. D. Murane, Attaching Creditor;

LYONS, Judge of the District Court. [67]

The said trustee and the intervenor insist:

First: That the Court is without jurisdiction in this proceeding to grant the relief prayed for in the petition for the reason that a summary proceeding of this character can under no circumstances be maintained under our law.

Second: That the evidence fails to show that the fund now in the hands of said trustee is the same fund that was collected by the plaintiff in this action on his judgment against the defendants herein.

Third: That the said intervenor and the said C. D. Murane, having attached and garnished said fund, are, under the Alaskan statute, in the position of innocent purchasers for value without notice and, therefore, have a prior claim to the fund in controversy, and that, even though summary proceedings may be maintainable against a party to the record after the reversal of the judgment, such proceedings cannot be maintained against strangers to the record.

Fourth: That the said trustee is holding said fund to secure certain sureties on an injunctional bond with the plaintiff Chambers as principal and that said sureties are still liable on said bond and have not been made parties to this proceeding.

The first contention made by trustee and the intervenor is not tenable.

“Both under the common law and by statute in most jurisdictions a party entitled to restitution may obtain it by a summary proceeding in the same suit without resorting to a new one for that purpose, and on the granting of the motion for restitution it becomes a part of the judgment and the amount can be collected by execution, although its enforcement is not confined to this means alone.”

3 Cyc. 467, 468, and cases cited; Reynolds vs. Harris, 76 Am. Dec. 459; Orke vs. McManus, 129 N. W. 68, at page 70; First National Bank of Fort Scott vs. Elliott, 55 Pac. 880; McFadden vs. Swinerton, 36 Ore. 336, at page 355. [68]

“Where the record itself shows the payment of the judgment the party may have restitution without a *scire facias*; but where the facts do not appear of record a *scire facias* or some proceeding of that nature is necessary.”

3 Cyc. 468, and cases cited.

The proceeding here is in the nature of a common-law *scire facias*, that is, a citation to the party who collected money on the judgment, which was afterwards reversed, to show cause why he should not be compelled to either pay the money to the other party

to the action or into the registry of the Court to abide the determination of the action on a new trial which has been directed by the appellate court. To the same effect see *McFadden v. Swinerton*, *supra*, where many authorities sustaining this proceeding are cited.

Referring now to the second contention insisted upon by the trustee and the intervenor, to wit, that the fund which petitioner seeks to have paid by the trustee into the registry of the Court is not the same fund that was collected by the plaintiff Chambers on the judgment rendered in this Court, which was thereafter reversed by the Supreme Court of the United States. The evidence in this matter is substantially undisputed and shows that certain gold-dust was, by stipulation between the parties, held in registry of the Court to abide the determination of the action; that thereafter by order of the Court and upon stipulation the said dust was converted into money and deposited with the Miners & Merchants' Bank of Nome, Alaska, who issued to the District Court a certificate of deposit therefor; that thereafter, upon the affirmance of the judgment of this Court by the Circuit Court of Appeals and before a writ of certiorari had been sued out from the judgment entered in the Circuit Court of Appeals for the Ninth Circuit, the said Miners & Merchants' Bank, under the order of this Court, paid to the plaintiff herein all of said fund which had theretofore been held in the registry of the Court; that thereafter the said plaintiff Chambers withdrew [69] from said bank a certain portion of said fund, leaving a bal-

ance of \$11,106.00; that thereafter and in October, 1909, the said Chambers delivered said sum last mentioned to said trustee in trust to secure certain parties who had signed an injunctional bond as sureties at the instance of said plaintiff Chambers in the case of Chambers v. LaFarge et al. It is true that there is no evidence that the money held by Cole as such trustee is the identical money which was collected from the defendants herein by the plaintiff under and by virtue of the judgment of this Court herein, but the evidence conclusively shows that it is a portion of the same fund; that is, that the credit which was given to the District Court by virtue of the certificate of deposit given to this Court by the Miners & Merchants' Bank, heretofore referred to, was merely transferred from the Court to the plaintiff by the enforcement of the judgment and thereafter from the plaintiff to his trustee Cole. Can it be seriously contended, if that fund were now in the Miners & Merchants' Bank to the credit of Chambers, it would not be subject to the order of this Court when such order of the Court is properly invoked by petition of defendants herein? The law does not require in proceedings for restitution for the payment and delivery of money that it must be the identical money which was taken from the other party to the action under and by virtue of a judgment which was thereafter reversed, but it is sufficient to satisfy the demands of the law if it is the same fund; and, in fact, if the proceeding were against a party to the action it would not be necessary to show that it was even the same fund, but the

Court could and should order the party who had profited by a judgment subsequently reversed to pay back into the registry of the Court, or to the other party, as the circumstances of the case might warrant, the amount of money which he had collected under and by virtue of such judgment. *Bills vs. Schlip*, 127 Fed. 103; *In re Howard*, 130 Fed. 1004; *In re Howard*, 135 Fed. 721. [70]

The third objection of the trustee and the intervenor to the granting of the petition herein is more serious. The facts, however, disclose that the intervenor Gilmore and the other attaching creditor, C. D. Murane, were attorneys for the plaintiff in the above-entitled action, and the claim of Murane, which has been reduced to judgment with an order for the sale of attached property including the fund in controversy, is based upon a claim for services as attorney rendered the plaintiff Chambers in the above-entitled action. The intervenor testified that a portion of his claim under which the garnishment was made is for attorney's fees for services rendered in this action. What amount of the intervenor's claim is for services in this action does not appear, but the evidence tends to show that the greater portion of the claim is for services rendered the plaintiff Chambers by intervenor as counsel in this particular action. C. D. Murane filed no answer to the petition, but his counsel, L. G. Lomen, appeared with the intervenor and stated that the objections to the petition urged by the intervenor were substantially the same objections that would be made by Murane, and the evidence tends to show that both the inter-

venor and Murane have the same standing before the Court, except that the testimony tends to show that a portion of the claim of the intervenor is for services rendered the plaintiff by intervenor as counsel in other cases.

To sustain their contention that they have a superior claim to the sum in controversy over the petitioner even though the fund referred to may be the same fund realized by Chambers from the judgment of this Court, heretofore referred to, the attaching creditors invoke section 151 of the Code of Civil Procedure for the District of Alaska, found on page 174 of Carter's Annotated Alaska Codes, which provides, among other things, as follows: [71]

“From the date of the attachment until it be discharged, or the writ executed, the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property.”

It will be observed that the statute quoted states that the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration, but if it appears that the plaintiff had notice of prior equities he cannot be deemed an innocent purchaser for value without notice. It isn't pleaded nor is it proved that these attaching creditors did not have knowledge of the contingent equity which the defendants had in the money which was taken under the judgment in this action. They were attorneys for the plaintiff in the action; ap-

peared for him in both this Court and the Circuit Court of Appeals for the Ninth Circuit; and had full knowledge of the fact that a *certiorari* proceeding might be prosecuted from the judgment of the Circuit Court of Appeals herein to the Supreme Court of the United States; in fact, at the time Murane sued out his attachment the judgment of this Court and of the Circuit Court of Appeals in this action had been reversed by the Supreme Court of the United States. In *re Rhodes vs. McGarry*, 19 Ore. 222, at page 229, the Court said:

“The only ground upon which they claim to be purchasers in good faith and for a valuable consideration of the property is that the said proceedings were duly instituted. If they had purchased the block from McGarry for a valuable consideration and had claimed by virtue of such purchase a right to it to the exclusion of the equitable title which the appellant had therein they would have been compelled to allege and prove that they had no notice whatever, down to the time of the actual payment of the consideration, of any such title, nor of the circumstances alleged in the complaint from which such notice could be inferred; and then they would only have established an equity in themselves equal to that in favor of the appellant, although their having the legal title would give them a superior advantage. The legal title, however, without being coupled with an equal equity will not prevail over the equitable title. It seems to me that notwithstanding the lan-

guage of the code above set out, an attaching creditor, in order to be deemed a purchaser in good faith of the property as against one having an outstanding equity, must allege [72] and prove all the facts necessary to establish that character of ownership in favor of a purchaser of such property as against such an equity. It can hardly be supposed that the legislature intended by the provision of the code referred to, to place an attaching creditor on any more favorable grounds with reference to his rights in the property attached than that occupied by a purchaser of the property; nor to deem the former a purchaser in good faith except under the same circumstances in which the latter would be deemed such purchaser. Any other view would lead to absurd consequences and occasion injustice. It would enable a party to cut off an outstanding equity by resorting to an attachment when he would not be able to accomplish it by a direct purchase of the property. Such a result was obviously not contemplated by the adoption of the said provision of the code. If this view be correct it follows that the answer of the said respondents to the complaint in the suit was not sufficient to show that they were entitled to the standing of the purchasers of the block in good faith. The answer filed by them does not contain any such defense but confines itself strictly to a traverse of appellant's allegations. If the respondents had desired to claim that they be deemed purchasers in good faith of

the property they should have averred the facts which under the statute would have constituted them such in avoidance of the matters alleged in the complaint regarding the appellant's equity and not have attempted to avail themselves of such defense by merely controverting those allegations."

The statute construed by the Supreme Court of the State of Oregon in the case last cited is identical with the section of our statute under which the attaching creditors in this proceeding claim a superior equity to the petitioner. See, also, *Meier vs. Hess*, 23 Ore. 559; *Flegel vs. Koss*, 47 Ore. 366; *Jennings vs. Lentz*, 50 Ore. 483; *Dimmick vs. Rosenfeld*, 34 Ore. 101. It must follow, therefore, from the pleadings and evidence herein that the attaching creditors were not in the position of purchasers in good faith for value without notice of the contingent equity which the defendants had in the fund in controversy.

The attaching creditors insist that restitution of property taken under judgment which was thereafter reversed cannot be had against any person except a party to the record, and they insist that they were strangers to the record although they were attorneys for the plaintiff in this cause. [73]

"An erroneous judgment is the act of the court until vacated upon appeal or by some other proceeding. All persons may safely treat it as valid unless we may except from this rule the parties to the suit and their attorneys, and even they are affected by its reversal no further

than by being liable to make restitution of the property in their hands acquired under such judgment."

2 Freeman on Executions, 2d Ed., section 345.

"When the judgment is discontinued by virtue of its reversal the title reverts in the defendant in execution whether the plaintiff has in the meantime made any conveyance or not. The plaintiff's attorney on becoming a purchaser at a sale under execution in a case which he has conducted occupies a position as unfavorable as that of the plaintiff and must lose the property upon the reversal of the judgment."

2 Freeman on Executions, 2d Ed., section 347, page 1155; Galpin vs. Page, 18 Wallace, 350; Stroud vs. Casey, 78 Am. Dec. 556; 3 Cyc. 466.

Counsel for the attaching creditors rely particularly on the Bank of the United States vs. Bank of Washington, 6 Peters, 7, and Langley vs. Warner, 3 N. Y. 327, and latter cases from New York State which affirm the doctrine announced in Langley vs. Warner, *supra*. But the doctrine announced in re 6 Peters, 7, *supra*, cannot be successfully invoked here. In that case the Supreme Court of the United States held that after money had been collected on a judgment and thereafter had been appropriated by the party to the record collecting the same towards the liquidation of an existing obligation and that such judgment was thereafter reversed that the other party to the record from whom the collection was made was not entitled to restitution as against the

stranger whose debt had been paid, even though such stranger had been notified that a writ of error had been prosecuted from the trial court to the Supreme Court of the United States. Strangers are not bound to take notice of proceedings on appeal or writs of error when the judgments appealed from are not superseded; but parties and their privies must take cognizance of such proceedings, and, if they realize on a judgment which is afterwards [74] reversed, they must make restitution to the other party in the amount realized. It is the policy of the law that judgments when entered should be respected and that parties bidding at judicial sales should be protected in order that legitimate bidding may be encouraged, and for that reason the stranger who purchases at a judicial sale made in pursuance of a judgment rendered by a Court having jurisdiction of the parties and subject matter is protected in his title although the case may be subsequently reversed. But the law does not extend such protection to parties to the record or their privies. In the New York cases relied upon by the attaching creditors the funds sought to be collected in those instances had actually been paid to the attorney of the party to the record who collected the same and it was applied in payment of an obligation of such party to his attorney. Whether such holding is in consonance with the weight of authority is not necessary to pass upon in this instance, for the reason that the holding by the New York courts in the cases referred to cannot apply to the facts in this case. The attaching creditors here have merely attached the

fund which, so far as the record in this case at this time discloses, belongs to the defendants in this action, since it was taken from them by virtue of a judgment which was thereafter reversed; and, while it is true that both parties to the action stipulated that that fund might remain in the registry of the court until the cause was finally determined, yet it is also true that the defendants, while operating the property, took the gold from the disputed premises, and the plaintiff having brought suit to recover a half interest in the mining claim in controversy and having threatened to enjoin the continued operation of the mine the defendants in order to prevent such injunction, agreed that the fund should be paid into the registry of the court as royalty to abide the determination of the action. The plaintiff having procured [75] judgment in this court, that fund was taken by him under such judgment. He thereby secured an advantage of the defendants by reason of an invalid judgment, and, while under the facts in this case the Court cannot direct that the money be returned to the defendants because the parties stipulated that it should remain in the registry of the Court until the ownership thereof was determined by the Court, yet the Court can and should direct the money to be paid into the registry of the Court unless the rights of strangers have intervened, and thereby prevent plaintiff herein from securing an advantage of the defendants by reason of an invalid judgment, which has been reversed by the Supreme Court. The intervenor pleads and insists that the petitioner herein will not be entitled to any

portion of the fund after the retrial of this case for the reason that the intervenor alleges that the petitioner is indebted to the plaintiff herein for a much greater sum than the fund in controversy. But that question cannot be determined in a proceeding of this character. In *re* Florence Cotton & Iron Co. vs. Louisville Banking Co., 36 Southern, 456, at page 457, the Court said, among other things:

“In *Ex parte* Walter, *supra*, the question arose in the chancery court which had undoubted jurisdiction to determine it on equitable principals and this court said with reference to a party who had enforced the collection of money on a decree thereafter reversed: ‘He had no right to the money involved in the litigation in contemplation of law until there should be a correct determination of the matters in dispute, however clear his rights may have been in point of fact. He therefore proceeds with the cause having an undue advantage of his adversary and is in fact in the attitude of having enjoyed what he claimed before the right to it had or could have been determined. We entertain no doubt, therefore, of the absolute right to have restitution made on the one hand and the absolute correlative duty to make restitution on the other wholly regardless of consideration looking to the final equities of the parties.’ We adopt this latter expression as applicable to this case and accordingly hold that the existence of the debt claimed by Field in the suit by Thomas is not a defense in this suit, and this without regard to

the merit of the suit or to the question discussed by counsel of whether the dismissal operated as a retraxit." [76]

In re Walter, 7 Southern, 400:

"The right to restitution cannot in any case be resisted on the grounds that on the final hearing of the cause it will appear that the party of whom the restitution is sought is entitled to the property of which he got possession or to the money that he received under the reversed Judgment."

2 Freeman on Judgments, 4th Ed., Section 482; Hier vs. Anheuser-Busch Brewing Assn., 83 N. W. 77; First National Bank of Fort Scott v. Elliott, 55 Pac. 880; Denning v. Yount, 71 Pac. 250; Reynolds v. Housmer, 45 Cal. 616; Delano v. Wild, 71 Am. Dec. 687; James v. Hacker, 5 Mass. 264; Cumings v. Noyes, 10 Mass. 433; McGilton v. Love, 54 Am. Dec. 449; Fortsman v. Schulting, 15 N. E. 366.

If the defendants should prevail in this action it certainly would be inequitable to permit the counsel for plaintiff to satisfy their judgments against the plaintiff out of funds belonging to the defendants; and the proper method of determining title to the fund in controversy as between the plaintiff and the defendants in this action is by trial of this action. The judgment heretofore entered has been set aside by the Supreme Court and a new trial directed. It must be obvious, both from reason and authority, that who will prevail in this action and whether the plaintiff may recover any judgment from the de-

fendants, or either of them, is a matter that cannot be determined in this special proceeding for a summary restitution.

Proceeding now to a consideration of the fourth objection interposed by the intervenor and the trustee to the granting of the petition herein, it becomes necessary to review the facts as disclosed by the pleadings and evidence. The action of *Chambers vs. LaFarge et al.*, in which a temporary restraining order was procured by the execution of the bond referred to, was commenced several months prior to October, 1909, the time which the trustee claims the plaintiff delivered the fund to him to be held by him in trust for the protection of said sureties [77] against any liability by reason of the signing of said injunctive bond. The trustee refers to a certain contract between himself and Chambers, a copy of which is attached to the answer of the trustee to the petition herein, and the trustee alleges that he is holding said fund under and by virtue of that contract; but it is clear from an examination of that instrument that it makes no reference whatever to the fund in controversy in this action. It does refer to a deed to certain property by the plaintiff to the trustee to be held in trust by him for the protection of said sureties, but it neither expressly nor by implication refers to the fund sought to be recovered by the petition herein. The answer of the trustee does allege as follows:

“That upon presentation of said order the said Miners & Merchants’ Bank cancelled the said certificate of deposit and said money was

placed to the credit of plaintiff J. J. Chambers; that thereafter the said Chambers deposited with this answering defendant as said trustee for the said bondsmen above named, the sum of \$11,-106.00, which said money was the property of said plaintiff J. J. Chambers, as this answering defendant is informed and believes, and this answering defendant now holds the same as trustee under the terms and conditions of said trust agreement above set forth."

As before stated, the agreement referred to and attached to the trustee's answer does not either expressly or impliedly authorize the trustee to hold such fund for any such purpose. The plaintiff Chambers may have directed him to hold said money for such purpose, but there is no allegation that there was any additional agreement between Chambers and the sureties than the one, a copy of which is attached to the trustee's answer. If it be true then that the agreement relied upon by the trustee to authorize him to hold the money as trustee for the protection of the sureties referred to is the one, a copy of which is attached to his answer to the petition, and if the agreement to which he refers confers no such authorization and no other or additional agreement between Chambers and the sureties is pleaded or proved by him, then it must follow that he is not entitled [78] to hold the funds as trustee of Chambers for the protection of strangers to the record against the petitioner herein. But, even if there were such an agreement, it does not appear that there is any consideration therefor. The injunctional bond had been

signed by the sureties months before it is claimed the fund in controversy was delivered to the trustee by Chambers to be held in trust for the protection of such sureties. The sureties had already become liable on the injunctional bond. The claim of the sureties, therefore, that such fund be held as a protection to them against possible liability on such bond cannot prevail against the petitioner who stands before the law, so far as this proceeding is concerned, in the same position as though the appellate court had adjudicated that he was the owner of the fund in controversy; for, as has been before stated, the question as to who will prevail in this action cannot be considered in these proceedings, and the right of the defendants in this action to restitution of the money collected by the plaintiff under and by virtue of the judgment of this Court, which has heretofore been reversed, is the same as though the appellate court had adjudicated him to be the owner of such fund and had actually directed restitution of the same.

For the reasons hereinbefore assigned, the petition of the defendant Waskey will be allowed. Let an order be entered to that effect.

Given in open court at Ketchikan, Alaska, this 15th day of October, 1912.

THOMAS R. LYONS,
Judge of the District Court.

[Endorsed]: No. 1629. In the District Court of the United States for the Div. No. 2 of Alaska. J. J. Chambers, Plaintiff, vs. Andrew Eadie, J. Potter Whittren and Frank H. Waskey, Defendants. W. A. Gilmore, Intervenor. J. J. Cole, Trustee. Opin-

ion, Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Dec. 20, 1912. John Sundback, Clerk. By ———, Deputy. L. [79]

In the District Court for the District of Alaska, Second Division.

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

W. A. GILMORE,

Intervenor.

J. J. COLE,

Trustee.

**Order [Directing J. J. Cole to Pay Certain Moneys
into Registry of Court, etc.]**

This matter coming on for hearing on the petition of Frank H. Waskey, one of the defendants, for an order requiring J. J. Cole to show cause why he should not pay a certain fund of Eleven Thousand One Hundred and Six Dollars into the registry of this Court; and the Court having heretofore heard the evidence adduced by said petitioner, said trustee J. J. Cole, and the intervenor herein; and having thereafter taken the same under advisement; and having thereafter made its Findings of Fact and Conclusions

of Law herein; and the Court being now fully advised in the premises;

IT IS, THEREFORE, ORDERED that the said J. J. Cole forthwith pay into the registry of this Court the said sum of Eleven Thousand One Hundred and Six Dollars, which sum shall be held by the Clerk of this Court in the registry of this Court, to abide the determination of this action or the further order of this Court. And the said intervenor and trustee are hereby granted four months from date hereof within which to prepare, present and file a Bill of Exceptions herein.

Done in open court at Ketchikan, Alaska, October 15, 1912.

THOMAS R. LYONS,
Judge of the District Court. [80]

[Endorsed]: No. 1629. In the District Court of the United States for the Div. No. 2 of Alaska. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. W. A. Gilmore, Intervenor, J. J. Cole, Trustee. Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Dec. 20, 1912. John Sundback, Clerk. By _____, Deputy. L. Vol. 10, Orders and Judgments, p. 59. C. [81]

In the District Court for the District of Alaska, Second Division.

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE et al.,

Defendants.

Proposed Bill of Exceptions of Respondent J. J. Cole and William A. Gilmore, Intervenor.

BE IT REMEMBERED, that on the 3d day of September, 1912, the petition of Frank H. Waskey, filed in the above-entitled court and cause, coming on regularly to be heard before the Hon. Thomas R. Lyons, District Judge; Messrs. Ira D. Orton and Albert Fink appearing for petitioner, and Mr. G. J. Lomen and Mr. W. A. Gilmore, appearing for the respondent and intervenor, and the plaintiff, J. J. Chambers, appearing in person.

Thereupon the following proceedings were had:

Mr. Gilmore, on behalf of the respondent, J. J. Cole, filed a demurrer to the petition.

After argument the demurrer was overruled by the Court and an exception was taken and allowed.

Upon motion of Ira D. Orton, petitioner was allowed by the Court to amend the petition by interlineation.

Thereupon the answer of J. J. Cole, respondent, and answer of William A. Gilmore, intervenor, was filed.

Thereupon the plaintiff J. J. Chambers orally consented to the restitution of said fund as prayed for in the petition, but denied some of the matters therein contained.

Thereupon Ira D. Orton filed replies to the answers of J. J. Cole and William A. Gilmore. [82]

AND BE IT FURTHER REMEMBERED that on said 3d day of September, 1912, said matter being at issue, came on for hearing before Hon. THOMAS R. LYONS, District Judge, on the pleadings as thus stated, and thereupon J. J. Cole was called and duly sworn as a witness on behalf of the defendant Waskey, and testified as follows:

Testimony of J. J. Cole [for Defendant Waskey].
(Examination by Mr. FINK.)

My name is J. J. Cole; I am manager of the Miners & Merchants' Bank in Nome; I am the gentleman on whom the order to show cause was served in these proceedings.

Q. You recall the occasion in October, 1909, when Mr. Gilmore presented to you an order of Court directing that certain funds that the Miners and Merchants' Bank had theretofore held subject to the order of the Court in the case of Chambers vs. Eadie, should be turned over to the plaintiff in the case, Dr. Chambers?

A. I think there was such an order. (Continuing.) I do not know the time,—I do not even remember the occasion. I think that on the 29th of October or the 30th, the cashier of the Miners & Merchants' Bank turned over to me a certificate of de-

(Testimony of J. J. Cole.)

posit made out in the name of J. J. Cole, Trustee, in the sum of fourteen thousand dollars. I have that certificate with me.

Mr. FINK.—We offer it in evidence.

Mr. GILMORE.—No objection.

Mr. FINK.—(Reads:) “This certifies that —— has deposited in this bank fourteen thousand four hundred forty-eight and 30/100 Dollars, payable to the order of J. J. Cole, Trustee, on the return of this certificate, properly [83] endorsed. Signed. C. G. Cowden, Cashier.”

Q. The signature on the back, “J. J. Cole,” that is your signature on the back?

A. Yes, sir. (Continuing.) This certificate of deposit came from the Miners & Merchants’ Bank, that is the original certificate.

Q. Now this also has stamped across the face of it, “Miners & Merchants’ Bank of Alaska, October 30, 1909. Paid. Nome, Alaska.”

A. Yes, sir. (Continuing.) I think the certificate was made out October 29, 1909. It was made out to me as trustee, to my order. I suppose the bank deposited the money; it was the proceeds of the bullion left over in the Bon Voyage case. I suppose the cashier of the bank deposited this money to my credit as trustee, on the 29th of October, 1909; that certificate as I take it was made from the proceeds of the bullion from the Bon Voyage litigation.

Q. Was there another certificate before this?

A. The original certificate.

Q. Where is it? A. Here it is.

(Testimony of J. J. Cole.)

Mr. FINK.—The first certificate I read is marked Exhibit “A.” We will call this Exhibit “B,” and offer it in evidence.

Mr. GILMORE.—All right.

Mr. FINK.—(Reads:) “No. 11321. Miners & Merchants’ Bank of Alaska. Certificate of Deposit. This certifies that on account of Bon Voyage suit No. 1052, have deposited in this bank fourteen thousand four hundred forty-eight and 30/100 Dollars, payable to the order of U. S. District Clerk on return of this certificate properly [84] endorsed.” Signed, “A. W. Kah, Assistant cashier.” Stamped, “Not over \$16000” and “Not subject to check”; also “Miners & Merchants’ Bank of Alaska, Oct. 29, 1909, Paid. Nome, Alaska.” And on the back, “Paid by order of Court, October 29, 1909.”

Q. Do you know whose writing that is on the back?

A. That is mine.

Q. Now, this certificate of deposit, Exhibit “B” that I have just read, represents what, Mr. Cole?

A. Well, I suppose it represents gold that had been taken out of the Bon Voyage claim and deposited, and in the case of Chambers vs. Eadie. (Continuing.) I wasn’t in the bank at the time, I know nothing further than what it says on the certificate itself; what it shows us on the back of the original certificate there, the assay certificate.

Mr. FINK.—We offer the assay certificate in evidence as Exhibit “C.”

Mr. GILMORE.—No objection.

Mr. FINK.—(Reads:) No. 1052. Gold bullion

(Testimony of J. J. Cole.)

deposited in the Miners & Merchants' Bank of Alaska, the 6th day of June, 1907, by royalty Bon Voyage claim. Net before melting, 814.14 oz. net after melting, 795.60 oz. Fine \$18.67. Total value \$14,855.68. Charges \$371.38, net \$14,484.30. A. W. Kah, Assayer."

Q. Now, Mr. Cole when did you become manager of the Miners & Merchants' Bank?

A. I think it was in the fall of 1908. (Continuing.) At that time the Miners and Merchants' Bank had in its possession bullion of the net value of \$14,484.30 deposited with it in the case of Chambers vs. Eadie; after that the bullion was by order of Court reduced to bar and the bar was shipped out and sold, and Exhibit "C" represents the proceeds of that particular bar. [85]

Q. So the proceeds of the sale of the gold bar were deposited in the Miners & Merchants' Bank, and this certificate of deposit was issued as evidence of that fact?

A. Held it there—after the assay of the bullion a credit was made for the value of the bar represented in that certificate you have got there, after we had sold it. (Continuing.) We sold it outside; that is the assay value of the bar.

Q. But this certificate of deposit represents the fund that you deposited in the bank in lieu of the gold?

A. Not the fund I deposited. The fund I deposited is the other certificate.

Q. I am talking about the original \$14,484.30 worth

(Testimony of J. J. Cole.)

of bullion there?

A. That was deposited to the credit of the U. S. District Court.

Q. Now, the bullion that the bank took over, what did you place in the bank in lieu of the bullion?

A. What you got in your hand there. (Continuing). That certificate represents the value of the bullion.

Q. So in place of the bullion you gave a credit of \$14,484.30?

A. To the U. S. District Court.

Q. Exactly; and this is the evidence of credit you issued, this certificate of deposit dated June 7, 1909?

A. It was issued, I did not issue it.

Q. Now, do you know who brought this certificate of deposit to you in October, 1909?

A. I suppose it was handed to me by Mr. Cowden. (Continuing.) That first certificate was in the possession of the bank all the time.

Q. Now, on October 29, 1909, Mr. Gilmore came in didn't he, [86] with an order of the Court?

A. Yes, sir.

Q. And you then got this certificate of deposit out?

A. Somebody got it out.

Q. Just relate what happened then.

A. As I said before, I don't know whether Mr. Gilmore was there when the certificate was handed me, I think he left instructions that it was to be handed to me; that is all I know as the certificate was made out and handed to me to hold as trustee. (Continuing.) I think that when Mr. Gilmore

(Testimony of J. J. Cole.)

brought the order of the Court, the transaction was had with Mr. Cowden, cashier, who issued the other certificate and gave it to me. The certificate of October 29, 1909, was cancelled and the other certificate issued. That is certificate B was cancelled and certificate A issued in lieu of certificate B.

Q. This certificate A represents the same identical fund that certificate B had represented?

A. Yes, sir, if the amount is the same it did.

Q. What?

A. If the amount is the same it did.

Q. Did it or did it not? And if not what other fund?

A. I suppose it represented the same fund.

Q. Mr. Cowden cancelled Exhibit "B" and delivered you certificate A? A. Yes, sir.

Q. What did you do with certificate A?

A. Well, on either that day or the next, I don't know which, according to the cancellation of the certificate, Dr. Chambers drew some of the money to pay an indebtedness that he had with the bank, which reduced this certificate to \$11,106.00. [87]

Q. How did he draw it down?

A. By receipting the certificate and reducing it to \$11,106, leaving in my possession \$11,106.00. (Continuing.) I think there was a certificate or credit in the bank. At that time Dr. Chambers owed the bank something over three thousand dollars. I couldn't tell you exactly from memory.

Q. Now, what I want to know is this—did Chambers and Gilmore come in and simply say to you de-

(Testimony of J. J. Cole.)

duct what Chambers owed the bank from this and deposit the balance with yourself as trustee?

A. Yes, sir.

Q. That was what was done? A. Yes, sir.

Q. Very well, then, you deposited with yourself as trustee, under directions of Dr. Chambers and Mr. Gilmore, the identical fund which was represented by this certificate B and the certificate A?

A. Yes, sir.

Q. Less what Dr. Chambers owed the bank?

A. Yes, sir.

Q. Now, that fund has remained in your possession ever since? A. Yes, sir.

Q. You still have possession of it?

A. Yes, sir.

Q. You have also possession of other funds besides that belonging to Dr. Chambers?

A. Other funds in trust besides that.

Cross-examination by Mr. GILMORE.

Q. Now, you say this fund remained there. What do you mean?

A. I mean the fund deposited by the U. S. District Clerk.

Q. Now, was there ever deposited by the U. S. District Clerk any specie, coin or money at any time?

A. No, sir. [88]

Q. Was there ever any specie or money involved in any of these transactions at the time of the issuing of these certificates of deposit?

A. No money ever changed.

Q. Now, Mr. Cole, if I understand you correctly,

(Testimony of J. J. Cole.)

at the time the first order was issued by the Court to melt the money, June 7, 1907, the bank then sold the gold, got the gold into the bar and sold it?

A. Forwarded it outside and they credited us, as coming to the U. S. District Clerk.

Q. No specie or money transaction whatever occurred, the bank just issued the Clerk of the Court a certificate of deposit?

A. According to the assay report.

Q. You simply sent the bar outside and got credit outside for it?

A. Well, I presume that was what was done by the bank at that time as that is the usual custom when we ship bullion out there and I presume it was the same in this case. (Continuing.) I don't remember whether I was present at the time you came in with the Court's order on October 29, or not, I may have been in my office; I can't remember what transactions took place at that time, all I remember was the certificate was given to me, calling for that much money in the certificate. Prior to that time and about the 11th day of June, 1909, I became trustee for Dr. Chambers to protect his bondsmen, Mr. Rowe, Mr. McMannus and others. I am the same Cole mentioned in the deed of trust and in the agreement, set up in the pleadings.

Q. Now, when this certificate of deposit was handed to you by Mr. Cowden, Cashier of the Miners & Merchants' Bank on October 29th, 1909, why was it delivered to you? [89]

A. As trustee of Dr. Chambers, under a written

(Testimony of J. J. Cole.)

trust for these sureties I have just named.

Q. And did you hold the certificate thereafter, that amount of money under it?

A. Yes, sir. (Continuing.) At the time Dr. Chambers directed me to deduct the amount of his indebtedness to the bank, the same was done and his notes for something over three thousand dollars were delivered to him and the new certificate in the sum of \$11,106.00 was made out to myself as trustee for these sureties.

Q. Was there any money transaction so far as the certificate was concerned? A. No.

Q. Was anything ever said as to how you were to hold it? A. No, sir.

Q. Did you receive it as agent of the bank?

A. I have always held that fund as trustee. (Continuing.) Under the written trust I have mentioned for said sureties. There was nothing in the trust to compel me to keep the money in the Miners & Merchants' Bank, I could have kept it in the Scandinavian-American Bank, of Seattle, or elsewhere, under the terms of the trust. I have only held this certificate of deposit only for convenience. At the time Dr. Chambers received his notes and the indebtedness to the bank was satisfied and the certificate issued, it was understood that Dr. Chambers was to go up and satisfy the judgment record to that amount. I never saw the satisfaction but I was told that he had satisfied it. At the time I talked to you and Dr. Chambers in the bank you instructed him to satisfy the record.

(Testimony of J. J. Cole.)

Q. No cash, coin or specie of any kind was delivered by anyone on this date to you, Mr. Cole, other than this certificate of deposit? A. No. [90]

Redirect Examination by Mr. ORTON.

Q. When that new certificate was handed you, after paying the Miners & Merchants' Bank, it was for \$11,106.00? A. Yes, sir.

Q. And was payable to you as trustee?

A. Yes, sir.

Q. There was also money behind these certificates of deposit to take them up?

A. The bank had stood responsible for the amount that had been deposited on them.

Recross-examination by Mr. GILMORE.

Q. Did the bank have anything to do with this matter after paying the first certificate?

A. No, sir.

Q. You had a credit there for this money?

A. Yes, sir.

Re-redirect Examination by Mr. ORTON.

Q. In your name as trustee? A. Yes, sir.

Cross-examination by J. J. CHAMBERS.

Q. You stated that Mr. Gilmore and myself and you, were present there, now are you sure about that? A. What do you mean?

Q. When the settlement was made for the transfer of the money, are you sure the three of us were all there at the same time?

A. What time do you refer to?

Q. The order of the District Court to transfer the money [91] over to me, when the order was made?

(Testimony of J. J. Cole.)

A. I don't think I said so. You must have misunderstood me.

Q. You don't know whether that was on the same day Mr. Gilmore was there or not?

A. It seems to me that it was the next day that you came in.

Q. Mr. Gilmore was not there at that time?

A. He came in with you and you came into my office and as I remember the conversation that took place between you and Gilmore, this money had been deposited as security and Gilmore consented for you to pay your indebtedness before all this money went into the fund for all these creditors.

Q. We didn't have any misunderstanding about the settlement, it was all satisfactory, wasn't it?

A. All satisfactory.

Thereupon WILLIAM A. GILMORE was called as a witness on behalf of the petitioner Waskey, and being duly sworn, testified as follows:

Testimony of William A. Gilmore [for Petitioner Waskey].

Direct Examination by IRA D. ORTON.

Q. Mr. Gilmore, the attachment which you refer to in paragraph 4 of your answer in this case was levied in an action at law brought by you as plaintiff against J. J. Chambers, to recover attorneys' fees alleged to be due from J. J. Chambers to yourself for services in this and other cases?

A. Yes, sir; quite a few of them.

Q. The attachment referred to under paragraph 5 of Cornelius D. Murane vs. J. J. Chambers was lev-

(Testimony of William A. Gilmore.)

ied in a suit brought by Cornelius D. Murane vs. J. J. Chambers for attorneys' fees rendered in this very case, was it not? [92]

A. For services, as I recollect, performed on the trial of Chambers vs. Eadie, the same case, and for work done in the Appellate Court in the same case.

Q. In other words, you and Judge Murane were both formerly Dr. Chamber's attorneys in this case?

A. Yes, sir.

Cross-examination by J. J. CHAMBERS.

Q. Mr. Gilmore, how was this money transferred from the bank?

A. I secured an order of Court of date the 29th of October, signed by Judge Moore, who then presided in this Court, and immediately went down to the Miners & Merchants' Bank and presented it to Mr. Cowden who was standing there at the cashier's window. Mr. Cole was also standing in back, and I asked them to turn over to the plaintiff, Chambers, the sum of money mentioned in the order; my recollection is that Mr. Cole was busy on some other matters and I asked Mr. Cowden to get the original certificate and pay it and cancel it, and informed him that you would be down probably that day or the next, and in the meantime Cole could hold the certificate, or have a credit there until such time as we could make arrangements or assign the certificate to the trustee; no cash, specie, coin or money passed between Mr. Cole or any officer of the bank.

Q. Was there any money paid to me?

A. The next day or the day after this transaction

(Testimony of William A. Gilmore.)

you went into the bank and I happened to be in there or you sent for me to come down there, and I explained what had been done the day before and you said it was satisfactory to you and Mr. Cole asked me if I had any [93] objections to the trustee paying what you owed the bank, and I had none and he proceeded to have your notes cancelled and returned them to you and issued a new certificate evidencing your credit for the amount; when the second certificate was issued no money passed in any way between the parties.

Q. Don't you remember, Mr. Gilmore, that for a month or six weeks we had been quarreling on account of this transaction, about this receipting on the record?

A. My recollection is at this time, that in the presence of Mr. Cole I told you to go right up to the courthouse and satisfy the judgment record; and I also remember that you did not come back for several days, and I think that sometime afterwards when I looked at the docket, that it had been satisfied and bears date of October 30th. I wish to state further that this satisfaction is of date October 30th, the day you were in the bank, and I think that the record shows that the satisfaction is made in your own handwriting.

Redirect Examination by Mr. ORTON.

Q. You testified in the case of William A. Gilmore vs. J. J. Chambers, did you not? A. Yes, sir.

Q. Did you not testify in that case as follows: "The following morning I filed the mandate and had

(Testimony of William A. Gilmore.)

the execution issued, served a copy on J. J. Cole, the president of the bank, and Cole turned the money over in my presence and under my direction to himself as trustee, it having been assigned to him as trustee for the bondsmen? [94]

A. Yes, I presume I did.

Q. Did you further testify as follows: "I immediately notified the Dr. to satisfy the judgment. He did so about six weeks afterwards to that amount, \$14,483.00."

A. Yes, it might have been six weeks, I don't remember the exact time, I think the order was dated the 29th of October, and it is my recollection that I told him to satisfy it the next day.

Q. That was the date of the delivery of the new certificate to Mr. Cole?

A. I don't recollect that I said that was the date.

Q. Well, you were there when it was done?

A. I do distinctly recall coming into the bank and telling either Mr. Cole or Mr. Cowden—telling them to leave that credit to Dr. Chambers and that we had been talking about it between ourselves and that I left it as I had to look him up and bring him in.

Q. Your recollection, of course, was very good about this matter at the time you testified in the case of Gilmore vs. Chambers?

A. I don't believe any better than now, about the same.

Q. And on that trial you testified as follows: "The following morning I filed the mandate and had the execution issued, served a copy on J. J. Cole the presi-

(Testimony of William A. Gilmore.)

dent of the bank, and Cole turned the money over in my presence, and under my direction to himself as trustee, it having been assigned to him as trustee for the bondsmen.”

A. If it is in the record I certainly did.

Q. And that was correct, of course?

A. Well, within a day or two—that is, I filed the mandate before I got the order of the Court. [95]

Q. Well, was it true as you testified?

A. Yes, as I have explained it to you, the transaction occurred exactly as I have told you.

Q. Occurred as you testified on the trial?

A. In substance it did.

Q. Yes. A. I don't see any difference.

Q. You say there had been an assignment of this fund to the bondsmen, this fund in the bank?

A. By the agreement and deed referred to on the 11th day of June, 1909.

Q. Show me where in the deed?

A. Appears for itself.

Q. Point it out then.

A. (Witness reads:) “Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereto and all judgments, rents, issues and profits therefrom, and all damages appertaining thereto, now of record or otherwise.”

Q. You claim, as I understand it, that by deeding the Bon Voyage claim to J. J. Cole he assigned to

(Testimony of William A. Gilmore.)

J. J. Cole the gold-dust that had been taken out of the Bon Voyage, that deed that is in evidence?

A. No, sir, at the time this trust deed was made, June 11th, 1909, the gold had been sold by the bank and this certificate was held by the bank for it.

Q. The gold had been sold, so that by conveying to Cole the Bon Voyage, he conveyed to Cole also the money that was in the bank?

A. He conveyed to Cole all his right, title and interest in [96] placer claim 51½ Little Creek and the Bon Voyage placer claim.

Q. Was there any other assignment other than that?

A. No, sir. (Continuing.) I would like to explain that the intent was to convey on the part of Dr. Chambers—Chambers to convey to J. J. Cole for their use and benefit all the property that he had in the Nome District in the way of placer claims. All interest therein and judgments for damages.

Mr. FINK.—I can't see where this is material at all. You can't vary this deed by stating what the intention was.

Mr. GILMORE.—It certainly goes to show that Cole was Trustee of these interests for Chambers.

Cross-examination by Mr. LOMEN.

Q. You had better explain the conversation had in your presence, between Dr. Chambers and Mr. Cole, in regard to the transaction, when this \$11,106.00 was deposited.

A. The substance of the conversation was that Dr. Chambers was to settle his indebtedness to the Min-

(Testimony of William A. Gilmore.)

ers & Merchants' Bank. Mr. Cole wanted to know whether I would make any objections to it and I assured them that there would be no objection to the Doctor paying his indebtedness that was due under his notes. The conversation was quite lengthy but the substance of it was that the notes should be paid, and that the remainder coming under the certificate should remain there with Mr. Cole as trustee, under the trust agreement deed of June 11th, 1909.

Petitioner Waskey rests. [97]

Thereupon William A. Gilmore, for the respondent J. J. Cole and for the intervenor, offered in evidence partial satisfaction of judgment signed by J. J. Cole in case of Chambers vs. Eadie, and the same was admitted in evidence as it appears in Vol. 2, page 40, and marked Respondent's Ex. No. 1, said exhibit being a partial satisfaction of the judgment in Chambers vs. Eadie to the extent of \$14,484.30, bearing date October 30, 1909; and

Thereupon the mandate of the Circuit Court of Appeals in the case of Chambers vs. Eadie was admitted in evidence without objection read and marked Respondent's Exhibit 2; and

Thereupon the order of Court of date October 29, 1909, was offered in evidence and admitted without objection, read and marked Respondent's Exhibit No. 3.

Thereupon IRA D. ORTON was called as a witness on behalf of respondent and intervenor, and testified as follows, being first duly sworn:

**Testimony of Ira D. Orton [for Respondent and
Intervenor.]**

Direct Examination by Mr. GILMORE.

Q. You are the Ira D. Orton mentioned here in the answer of Mr. Cole, as being the plaintiff in the case of Orton vs. Chambers, an attachment proceeding?

A. Yes, sir.

Q. You caused to be issued in this suit an attachment against this fund?

A. Yes, I did. Not this fund we are talking about here, whatever money Mr. Cole might have.

Q. In Mr. Cole's possession?

A. Yes, there are other large amounts of money.
[98]

Q. This and other money?

A. If we could hold it; if, however, the Court should decide it should not be paid over, we still claim my attachment on it.

Q. Mr. Orton, in that suit you appear as plaintiff in the capacity of representing petitioner Waskey for his creditors, do you not?

A. The papers in the suit speak for themselves, and as you know, I appear as trustee for the creditors of Waskey under certain deeds of assignment to me of certain property of Waskey's.

Q. Any proceeds after Waskey's creditors are paid, the residue from his property goes back to him?

A. That was not mentioned.

Q. That was understood?

A. There never was any understanding. (Continuing.) Waskey never had any understanding,

(Testimony of Ira D. Orton.)

that is, that he expressed to me; the property was conveyed to me in trust for the creditors.

Q. Were you one of the creditors?

A. I believe Mr. Waskey owes me money, money that I have advanced for costs, something like that.

Q. Are you willing to waive your rights in order to get this fund transferred into court?

A. No, sir, I am not willing to waive anything.

Q. Would not cancel it for them? A. Yes.

Q. Because you represent Waskey in one suit as trustee for the creditors and in the other as counsel for Waskey?

A. I represent the trustee on one suit because the trustee happens to own the cause of action, the trustee paid money out of the trustee fund to protect the property and for that reason I brought the suit in his name [99] to protect it.

Q. Now, does Waskey get any benefit himself under the agreement?

A. It benefits him to that extent. I presume so.

Thereupon J. J. CHAMBERS was called as a witness on behalf of respondent and intervenor and being first duly sworn testified as follows:

Testimony of J. J. Chambers [for Respondent and Intervenor].

Direct Examination by Mr. GILMORE.

Q. Now, in the Chambers-Eadie, the original suit out of which all these affairs have arisen between you and Mr. Waskey, state to the Court if you lost your legal interest therein or do you claim an equitable interest.

(Testimony of J. J. Chambers.)

Mr. FINK.—Objected to as immaterial to the issues in this matter.

The COURT.—The objection is sustained and an exception allowed.

Mr. GILMORE.—I would like to make an offer.

The COURT.—Proceed.

Mr. GILMORE.—I offer to show by this witness that he has coming on the ultimate trial of this case from the petitioner Waskey, and his codefendant, a large sum of money, to wit: six to eight thousand dollars, and in addition to that that he claims he owns by deed the Andrew Eadie interest in the property.

Mr. ORTON.—That is objected to as immaterial.
[100]

The COURT.—Sustained, to which ruling of the Court an exception was allowed.

[Testimony of William A. Gilmore, for Respondent and Intervenor (Recalled).]

Thereupon the respondent and intervenor recalled the witness WILLIAM A. GILMORE, who testified as follows:

I desire to offer in evidence the minutes of the Court, dated August 23d, 1910, in the case of William A. Gilmore vs. J. J. Chambers, and to read the same into the record.

The COURT.—You may proceed.

Thereupon Mr. Gilmore read into the record the minute entry contained in Vol. 16 of the records of the Court at page 571 as follows:

“This cause came on on the oral application of counsel for defendant, J. J. Chambers, before

Special Judge B. S. Rodey, to fix supersedeas on Writ of Error herein, Mr. William A. Gilmore, for the plaintiff appearing and contending that the supersedeas should be fixed in the amount of the judgment, and the defendant J. J. Chambers, through Parke Godwin, Esq., his attorney, contending that the supersedeas should be merely nominal inasmuch as the judgment was fully secured by attachment liens.

Thereupon Special Judge B. S. Rodey delivered an oral opinion on the application, stating that inasmuch as the judgment upon which the Writ of Error was sought to be sued out is fully secured by an attachment lien, and also a general judgment lien on the property of the defendant that a nominal bond should only be required, and ordered that on a written application being filed therefor, an order be entered granting the application for a Writ of Error and that the cost bond on error be fixed in the sum of Two Hundred and Fifty Dollars, and that when said bond is duly filed it shall suspend execution herein without affecting any legal liens or plaintiff's right to have same protected, now existing as security to the defendant in error pending the hearing on the Writ of Error now before the Circuit Court of Appeals.

On motion of William A. Gilmore, plaintiff was granted leave to file a motion to require defendant, J. J. Chambers, to pay into court certain monies, the proceeds of attachment proceed-

(Testimony of William A. Gilmore.)

ings heretofore received by him from the United States Marshal, T. C. Powell.

On motion of Parke Godwin, attorney for defendant, the defendant was granted ten days additional time in which to serve and file a bill of exceptions on the motion to set aside the judgment herein, relative to the attached property and vacate the judgment levied under the alias Writ of Attachment.”

Mr. GILMORE.—In order to show the Court that this particular fund now being litigated was a part of the property garnished in the [101] case of *Gilmore vs. Chambers*, I now offer in evidence the Writ of Attachment and the Marshal’s return thereto.

The COURT.—It may be received in evidence and properly marked by the clerk.

(Recital:) The said marshal’s return shows the garnishment of this same identical fund.

Thereupon Mr. Lomen, on behalf of respondent and intervenor, offered in evidence the judgment in the case of *Murane vs. Chambers* No. 2325, and the same was received and read in evidence without objection, and properly marked; also the judgment in the case of *William A. Gilmore vs. J. J. Chambers*, which was received in evidence and read to the Court and properly marked by the clerk.

Testimony closed.

BE IT FURTHER REMEMBERED, that the said cause was thereupon argued to the Court by counsel for the petitioner, Waskey, and counsel for

respondent and trustee Cole, and intervenor Gilmore, and duly submitted to the Court for decision and thereafter, on the 15th day of October, 1912, the Court rendered its opinion and made its written order in favor of petitioner Waskey and against respondent and intervenor, and directed by said order that said fund be turned into the registry of the Court; and thereupon the respondent and intervenor excepted to the said decision and order of the Court and the exception was allowed.

Now, within the time allowed by law, the respondent and intervenor present this their bill of exceptions and pray that the same may be settled and allowed by the Court.

Dated at Nome, Alaska, this 11th day of December, A. D. 1912.

G. J. LOMEN and
WILLIAM A. GILMORE,

Attorneys for Respondent and Trustee J. J. Cole
and Intervenor William A. Gilmore. [102]

[Order Settling and Allowing Bill of Exceptions.]

The above and foregoing Bill of Exceptions having been served, filed and presented for settlement within the time allowed by law, and being now found full, true and correct, containing all of the evidence introduced at the trial, the same is now settled and allowed.

Done in open court this 14 day of January, A. D. 1913, at Nome, Alaska.

CORNELIUS D. MURANE,
District Judge.

Service of the above and foregoing Bill of Exceptions is hereby admitted this 11th day of December, 1912.

O. D. COCHRAN,
Of Attorneys for Petitioner Waskey.

[Endorsed]: No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendant. Proposed Bill of Exceptions of Respondent J. J. Cole and William A. Gilmore, Intervenor. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Dec. 13, 1912. John Sundback, Clerk. By ———, Deputy. William A. Gilmore, Attorney at Law, Nome, Alaska, Attorney for Intervenor. Vol. 10, Orders and Judgments, p. 75. C. Refiled in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jan. 14, 1913. John Sundback, Clerk. By J. A. B., Deputy. [103]

[Minutes of Court—December 28, 1912.]

*In the District Court for the District of Alaska,
Second Division.*

TERM MINUTES, Special October, 1912, Term,
Beginning October 21, 1912.

Saturday, December 28, 1912, at 10 A. M.

Court convened pursuant to adjournment, Hon. CORNELIUS D. MURANE, District Judge, Presiding.

Upon the convening of Court the following proceedings were had:

1629.

CHAMBERS

vs.

EADIE et al.

Upon motion of Mr. William A. Gilmore the settlement of the proposed bill of exceptions of J. J. Cole and W. A. Gilmore was set for Saturday next at 10 o'clock A. M. [104]

[Minutes of Court—January 4, 1913.]

*In the District Court for the District of Alaska,
Second Division.*

TERM MINUTES, Special October, 1912, Term,
Beginning October 21, 1912.

Saturday, January 4, 1913, at 10 A. M.

Court convened pursuant to adjournment, Hon. CORNELIUS D. MURANE, District Judge, Presiding.

Upon the convening of Court the following proceedings were had:

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1629.

CHAMBERS

vs.

EADIE et al.

Upon motion of Mr. William A. Gilmore, the settlement of proposed bill of exceptions of J. J. Cole, trustee, and William A. Gilmore, intervenor, was

continued over the term and set for hearing and settlement on January 11, 1913. [105]

[Minutes of Court—January 11, 1913.]

*In the District Court for the District of Alaska,
Second Division.*

TERM MINUTES, General 1913 Term, Beginning
January 6, 1913.

Saturday, January 11, 1913, at 10 A. M.

Court convened pursuant to adjournment, Hon. CORNELIUS D. MURANE, District Judge, Presiding.

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Upon the convening of Court the following proceedings were had:

1629.

J. J. CHAMBERS

vs.

EADIE et al.

Mr. William A. Gilmore presented bill of exceptions for settlement, and the same was taken under advisement by the Court until 11 A. M. Monday, January 13, 1913.

Upon motion of Mr. Gilmore he was permitted to withdraw said bill of exceptions and amend the same by interlineation. Thereupon Mr. Gilmore presented and filed assignment of errors upon appeal to the Circuit Court of Appeals for the Ninth Circuit; also petition for an order allowing appeal; also order allowing appeal and fixing the amount of cost bond, which was signed by the Court and filed; also cost bond and order approving same; also presented

citation on appeal; also presented and filed order enlarging time to the 1st day of August, 1913, in which to file record on appeal in the Circuit Court of Appeals.

Mr. O. D. Cochran, on behalf of respondent, stated in open court that he had no objection to the signing of said appeal papers by the Court, and further stated that the cost bond and sureties thereon were satisfactory to the respondent.

Mr. Gilmore, on behalf of appellants, presented order for severance which was taken under consideration by the Court until 11 A. M. Monday, January 13, 1913. [106]

[Minutes of Court—January 14, 1913.]

*In the District Court for the District of Alaska,
Second Division.*

TERM MINUTES, General 1913 Term, Beginning
January 6, 1913.

Tuesday, January 14, 1913, at 11 A. M.

Court convened pursuant to adjournment, Hon. CORNELIUS D. MURANE, District Judge, Presiding.

Upon the convening of Court the following proceedings were had:

1629.

J. J. CHAMBERS

vs.

EADIE et al.

The bill of exceptions of J. J. Cole, Trustee, and William A. Gilmore, Intervenor, heretofore filed

herein, came on regularly for hearing and settlement.

Mr. William A. Gilmore, on behalf of trustee and intervenor, stated that with the permission of the Court, he and Mr. O. D. Cochran representing respondent, had agreed upon the amendments to the bill and the bill had been amended by interlineation, as directed by the Court.

Thereupon the Court signed an order approving said bill of exceptions and directed the same to be refiled.

The plaintiff, J. J. Chambers, asked the Court to have the minutes of the Court corrected in certain particulars, but the Court refused to make any corrections of the minutes that were made during the time that Judge Lyons presided over the Court.

The Court announced that he would refuse to sign the order of severance taken under consideration on Saturday last for the reason that he was disqualified. An exception was asked by appellants and allowed.

Mr. O. D. Cochran, attorney for respondent, consented to the filing of the petition for an order of severance and said order and that said petition and said order be incorporated in the transcript on appeal in this case. [107]

*In the District Court for the District of Alaska,
Second Division.*

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN
and FRANK H. WASKEY,

Defendants.

J. J. COLE, Trustee,

Respondent.

WILLIAM A. GILMORE,

Intervenor.

Assignment of Errors.

Come now J. J. Cole, Trustee, and William A. Gilmore, intervenor in the above-entitled action, and assigns the following errors upon which they will rely in prosecuting their said appeal to the Circuit Court of Appeals for the Ninth Circuit, from the final order of the Court made on the 15th day of October, 1912, and thereafter entered on the 20th day of December, 1912:

I.

That the Court erred in assuming and taking jurisdiction of the person and property of J. J. Cole, Trustee, without due process of law, or any process of law authorized under the Code of Alaska.

II.

That the Court erred in overruling and denying the demurrer of appellant, J. J. Cole.

III.

That the Court erred in making and entering its final order directing, commanding and compelling the appellant, J. J. Cole, to pay the said fund into the registry of the Court. [108]

IV.

The Court erred in assuming and taking jurisdiction of the said fund described in the said order made on the 15th day of October, 1912, and thereafter entered on the 20th day of December, 1912, and that the Court was without jurisdiction to direct that said fund be paid into the registry of the Court.

V.

The Court erred in overruling and denying the offer of the trustee and Intervenor at the trial of these proceedings to prove by the witness, J. J. Chambers, that he had a substantial interest in the fund in controversy as follows:

“Mr. GILMORE.—I would like to make an offer.

The COURT.—Proceed.

Mr. GILMORE.—I offer to show by this witness that he has coming on the ultimate trial of this case from the petitioner, Waskey, and his codefendant, a large sum of money, to wit: Six to eight thousand dollars as royalty, being a portion of this identical fund and in addition to that, that he claims he owns by deed, the Andrew Eadie interest in the property.

Mr. ORTON.—That is objected to as immaterial.

The COURT.—Sustained and exception allowed.”

VI.

The Court erred in assuming and taking jurisdiction and deciding this proceeding on its merits.

WHEREFORE, said J. J. Cole, Trustee, and William A. Gilmore, Intervenor, pray that the said final order made by [109] the Court on the 15th day of October, 1912, and thereafter entered in the above-entitled court on the 20th day of December, 1912, be reversed and set aside and that said fund be directed to be returned to the said J. J. Cole, Trustee.

G. J. LOMEN and
WILLIAM A. GILMORE,
Attorneys for J. J. Cole, Trustee, and William A.
Gilmore, Intervenor.

Due service of the within assignment of errors is hereby acknowledged by receipt of a copy, this 11th day of January, 1913.

O. D. COCHRAN,
Of Attorneys for Defendant and Petitioner Frank
H. Waskey.

[Endorsed]: No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., J. J. Cole, Trustee and Respondent and William A. Gilmore, Intervenor, Defendants. Assignment of Errors. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jan. 11, 1913. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen and William A. Gilmore, Attorney at Law, Nome, Alaska, Attorney for Respondent and Intervenor. [110]

*In the District Court for the District of Alaska,
Second Division.*

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN
and FRANK H. WASKEY,

Defendants.

J. J. COLE,

Trustee.

WILLIAM A. GILMORE,

Intervenor.

**Petition for and Order Allowing Appeal [and Fixing
Amount of Cost Bond].**

Come now J. J. Cole, trustee and respondent, and William A. Gilmore, intervenor in the above-entitled action, and feeling themselves aggrieved by the final order of the Court, made on the 15th day of October and entered on the 20th day of December, 1912, in the above-entitled cause, in favor of defendant and petitioner Frank H. Waskey, and against respondent and intervenor, do hereby appeal from said final order and from the whole and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and they pray that this their appeal may be allowed; and that a transcript of the record and proceedings upon which said order was made, duly verified, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that

said appellants further pray that an order be made fixing the amount of a cost bond to be given by said appellants upon said appeal.

Dated at Nome, Alaska, this 11th day of January, A. D. 1913.

G. J. LOMEN and

WILLIAM A. GILMORE,

Attorneys for J. J. Cole, Trustee and Respondent
and William A. Gilmore, Intervenor. [111]

Service of the above and foregoing petition acknowledged by receipt of a copy this 11th day of January, A. D. 1913.

O. D. COCHRAN,

Of Attorneys for Defendant and Petitioner Frank
H. Waskey.

[Endorsed]: No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., J. J. Cole, Trustee and Respondent, and William A. Gilmore, Intervenor, Defendant. Petition for an Order Allowing Appeal. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jan. 11, 1913. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen and William A. Gilmore, Attorney at Law, Nome, Alaska, Attorney for Respondent and Intervenor. [112]

*In the District Court for the District of Alaska,
Second Division.*

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

J. J. COLE, Trustee, Respondent.

WILLIAM A. GILMORE, Intervenor.

**Order Allowing Appeal and Fixing Amount of Cost
Bond.**

Upon motion of G. J. Lomen and William A. Gilmore, attorneys for J. J. Cole, Trustee, and William A. Gilmore, intervenor in the above-entitled action,

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final order heretofore made on the 15th day of October, and thereafter entered on the 20th day of December, 1912, in the above-entitled action, be, and is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations, motions, orders, pleadings and all proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that a cost bond be given by the appellants to the defendant and petitioner, Frank H. Waskey, in the sum of Two Hun-

dred and Fifty Dollars (\$250.00), pending said appeal.

Done in open court this 11th day of January, 1913.

CORNELIUS D. MURANE,

District Judge. [113]

Service acknowledged this 11th day of Jany., 1913,
by receipt of a copy.

O. D. COCHRAN,

Of Attys. for Frank H. Waskey.

[Endorsed]: No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Order Allowing Appeal and Fixing Amount of Cost Bond. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jan. 11, 1913. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Respondent and Intervenor. Vol. 10, Orders and Judgments, p. 74. C. [114]

*In the District Court for the District of Alaska,
Second Division.*

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

J. J. COLE, Trustee, Respondent.

WILLIAM A. GILMORE, Intervenor.

Cost Bond and Order.

KNOW ALL MEN BY THESE PRESENTS:
That we, J. J. Cole and William A. Gilmore, as principals, and F. A. Daniels and J. A. Bachelder as sureties, are held and firmly bound unto the defendant and petitioner, Frank H. Waskey, in the above-entitled action, in the sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said Frank H. Waskey, his heirs, executors, administrators and assigns, to the payment of which well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 11th day of January, A. D. 1913.

The condition of the above undertaking and obligation is that,

WHEREAS, the above-named J. J. Cole, trustee

and William A. Gilmore, intervenor, have filed their petition for an appeal and have taken an appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth [115] Circuit to reverse the final order of the above-entitled court made on the 15th day of October, 1912, and entered on the 20th day of December, 1912, rendered in the above-entitled court, and

WHEREAS, the said appellants desire to secure the defendant and petitioner, Frank H. Waskey, in the payment of his costs on appeal,

NOW, THEREFORE, if the above-named appellants shall prosecute the said writ to effect and answer all costs and damages if they fail to make good their plea, and shall pay or cause to be paid to the said defendant and petitioner, Frank H. Waskey, his heirs, executors, administrators and assigns all damages which he shall suffer by reason of said appeal, if the same should be wrongful and without sufficient cause, then this obligation shall be void; otherwise to remain in full force and effect.

J. J. COLE,

WILLIAM A. GILMORE,

Principals.

F. A. DANIELS,

J. A. BACHELDER,

Sureties.

United States of America,
District of Alaska,—ss.

F. A. Daniels and J. A. Bachelder, being first duly sworn, each for himself deposes and says:

I am one of the sureties named in the above under-

taking and am a resident of the District of Alaska; that I am not an attorney at law, marshal, deputy marshal, clerk of any court, or other officer of any court, and am worth the sum of Two Hundred and Fifty (\$250.00) Dollars in property exempt from [116] execution, and over and above all just debts and liabilities.

F. A. DANIELS.

J. A. BACHELDER.

Subscribed and sworn to before me this 11th day of January, A. D. 1913.

[Notarial Seal]

L. W. HAYDEN,

Notary Public in and for the District of Alaska.

Order [Approving Cost Bond.]

The above and foregoing cost bond is hereby approved this 11th day of January, A. D. 1913.

CORNELIUS D. MURANE,

District Judge.

The above and foregoing cost bond and order acknowledged by receipt of a copy, this 11th day of January, 1913.

O. D. COCHRAN,

Of Attorneys for Defendant and Petitioner, Frank H. Waskey.

[Endorsed]: No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., J. J. Cole, Trustee, and William A. Gilmore, Defendants. Cost Bond and Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jan. 11, 1913. John Sundback, Clerk. By

J. A. B., Deputy. G. J. Lomen and William A. Gilmore, Attorney at Law, Nome, Alaska, Attorney for Respondent and Intervenor. Vol. 5, Civil Bond Record, p. 183. C. [117]

*In the District Court for the District of Alaska,
Second Division.*

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE et al.,

Defendants.

Order Enlarging Time to File Record.

On motion of Messrs. G. J. Lomen and William A. Gilmore, attorneys for J. J. Cole, respondent, and William A. Gilmore, intervenor in the above-entitled cause, and good cause appearing to the Court therefor,

IT IS HEREBY ORDERED that the time for filing and docketing the transcript and record in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, is hereby extended and enlarged to and until the first day of August, 1913.

Done in open court this 11 day of January, 1913.

CORNELIUS D. MURANE,

District Judge.

Service of the above and foregoing order admitted by receipt of copy this 11th day of January, 1913.

O. D. COCHRAN,
Of Attorneys for Defendant and Petitioner, Frank
H. Waskey.

[Endorsed]: No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendant. Order Enlarging Time to File Record. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jan. 11, 1913. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Respondent and Intervenor. Vol. 10, Orders and Judgments, p. 73. C. [118]

*In the District Court for the District of Alaska,
Second Division.*

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE et al.,

Defendants.

Petition for an Order of Severance.

To the Honorable CORNELIUS D. MURANE,
Judge of the Above-entitled Court:

Come now respondent, J. J. Cole, and intervenor, William A. Gilmore, and for cause of petition allege:

That on the 15th day of October, 1912, a final order

was made by Honorable Thomas R. Lyons, Judge presiding in the above-entitled Court in the above-entitled action, in favor of defendant Frank H. Waskey and against your petitioners herein, in which said order it was decreed and directed that the respondent, J. J. Cole, pay a certain fund in his possession into the registry of the Court in the above-entitled action, to which said order reference is made for the purpose of this petition.

That at the hearing and trial of said proceedings the plaintiff, J. J. Chambers, consented that said fund be placed in the registry of the Court, and by said action refuses to join in an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said order so made and entered.

That thereafter, on the —— day of January, 1913, a bill of exceptions was prepared, settled and filed in [119] said action preparatory to the appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioners herein, J. J. Cole and William A. Gilmore, desire to appeal to said Circuit Court from said final order and desire the Court to make an order of severance allowing and permitting said respondent, J. J. Cole and intervenor, William A. Gilmore, the right to appeal from said order without joining the plaintiff, J. J. Chambers, thereto.

WHEREFORE your petitioners, J. J. Cole and William A. Gilmore, pray for an order granting the right of appeal to them and granting an order of severance barring said plaintiff from said right and

for such other order as the Court may deem proper in the premises.

J. J. COLE.

WILLIAM A. GILMORE.

United States of America,
District of Alaska,—ss.

William A. Gilmore, being first duly sworn, deposes and says:

That I am one of the petitioners named in the foregoing petition; that I have read the same, know the contents thereof, and the same is true as I verily believe.

WILLIAM A. GILMORE.

Subscribed and sworn to before me this 11th day of January, A. D. 1913.

[Notarial Seal]

L. W. HAYDEN,

Notary Public in and for the District of Alaska.

[120]

Service by receipt of copy of foregoing petition for severance admitted this 11th day of January, 1913.

O. D. COCHRAN,

Of Attorneys for F. H. Waskey.

[Endorsed]: No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendant. Petition for an Order of Severance. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jan. 14, 1913. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Respondent and Intervenor [121]

*In the District Court for the District of Alaska,
Second Division.*

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE et al.,

Defendants.

**Order [Granting J. J. Cole et al. Right to Appeal
Without Joining J. J. Chambers, etc.].**

Upon reading and considering the petition of petitioners, J. J. Cole and William A. Gilmore, praying for an order of severance from the plaintiff J. J. Chambers in the matter of the appeal in the above-entitled action, from the final order of the Court made on the 15th day of October, 1912, and it appearing to the Court from the record and proceedings in said action that the plaintiff, J. J. Chambers, has refused to join in the said appeal, and the Court being otherwise fully advised in the premises;

NOW ORDERS AND DIRECTS that the said petitioners, J. J. Cole and William A. Gilmore, be and they are hereby granted the right to appeal without joining the said J. J. Chambers in said appeal.

IT IS FURTHER ORDERED that the usual proceedings may be had and granted to the petitioners, J. J. Cole and William A. Gilmore in the preparation and completion of the said proposed appeal to the Circuit Court of Appeals for the Ninth Circuit.

Dated at Nome, Alaska, this — day of January,
A. D. 1913.

District Judge. [122]

Service acknowledged by receipt of copy this 11th
day of Jany., 1913.

O. D. COCHRAN,
Of Attys. for Waskey.

[Endorsed]: No. 1629. In the District Court for
the District of Alaska, Second Division. J. J. Cham-
bers, Plaintiff, vs. Andrew Eadie et al., Defendant.
Order. Filed in the Office of the Clerk of the Dis-
trict Court of Alaska, Second Division, at Nome.
Jan. 14, 1913. John Sundback, Clerk. By J. A. B.,
Deputy. G. J. Lomen and William A. Gilmore, At-
torneys at Law, Nome, Alaska, Attorneys for Re-
spondent and Intervenor. [123]

*In the District Court, District of Alaska, Second
Division.*

No. —.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

Verdict.

We, the jury duly empaneled and sworn to try the
above-entitled cause, find for the plaintiff and against

the defendants, and that the plaintiff is the owner in fee and entitled to the possession of an undivided one-half interest in the Bon Voyage Claim, described as follows, to wit:

Commencing at the initial stake which is situated about 1,500 feet in a southerly direction from the upper end line of Creek Claim No. 3 Below on Newton Gulch, a tributary of Dry Creek, said stake being in the north end line of said claim; thence 330 feet in a westerly direction and parallel to said Newton Gulch to corner stake No. 1; thence 1320 feet in a southerly direction and at right angles, to corner stake No. 2; thence 660 feet in an easterly direction to corner stake No. 3; thence 1,320 feet in a northerly direction to corner stake No. 4; thence 330 feet to initial stake or place of beginning; said claim being situated on the divide known as Gold Hill, between Newton Gulch and Nome River, and next to a certain Bench Claim known as Gold Hill Claim No. 1, and containing about twenty acres of placer mining ground.

And we further find that the plaintiff is entitled to damages against the defendants, Andrew Eadie, J. Potter Whittren, and Frank H. Waskey, in the sum of \$20,441.83, Twenty Thousand Four Forty-one 83/100 Dollars.

Dated this 3d day of September, 1907.

FLOYD W. DAVIS,

Foreman.

[Endorsed]: #1629. In the District Court, District of Alaska, Second Division. J. J. Chambers,

Plaintiff, vs. Andrew Eadie, J. Potter Whittren and Frank H. Waskey, Defendants. Verdict. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Sep. 3, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. McB. [124]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

Judgment.

This cause having come on for hearing in the above-entitled court on the 26th day of August, 1907, the parties appearing in person and by their respective attorneys, a jury having been duly and regularly empaneled and sworn to try said cause, and after hearing the testimony introduced by plaintiff and defendants, the arguments of counsel for plaintiff and defendants and the instructions of the court, retired to deliberate upon their verdict, and, subsequently, returned into court with the following verdict:

“We, the jury duly empaneled and sworn to try the above-entitled cause, find for the plaintiff and against the defendants, and that the plaintiff is the

owner in fee and entitled to the possession of an undivided one-half interest in the Bon Voyage Claim, described as follows, to wit:

Commencing at the initial stake which is situated about 1,500 feet in a southerly direction from the upper end line of Creek Claim No. 3 Below on Newton Gulch, a tributary of Dry Creek; said stake being in the north end line of said claim; thence 330 feet in a westerly direction and parallel to said Newton Gulch to corner stake No. 1; thence 1,320 feet in a southerly direction and at right angles, to corner stake No. 2; thence 660 feet in an easterly direction to corner stake No. 3; thence 1,320 feet in a northerly direction to corner stake No. 4; thence 330 feet to initial stake or place of beginning; said claim being situated on the divide known as Gold Hill, [125] between Newton Gulch and Nome River, and next to a certain Bench Claim known as Gold Hill Claim No. 1, and containing about twenty acres of placer mining ground.

“And we further find that the plaintiff is entitled to damages against the defendants, Andrew Eadie, J. Potter Whittren, and Frank H. Waskey, in the sum of \$20,441.83, Twenty Thousand Four Forty-one 83/100 Dollars.

Dated this 3d day of September, 1907.

FLOYD W. DAVIS,
Foreman.”

THEREAFTER, the said defendants by their attorneys filed a motion for a new trial to set aside the verdict of the jury, which said motion was submitted

to the Judge of the above-entitled court and was by the Court, prior to this date, overruled and denied.

And, whereas, heretofore under a stipulation signed by the attorneys for the respective parties, the following order was made by the Court:

“On reading and filing the foregoing stipulation, it is hereby ordered that the Miners and Merchants’ Bank of Alaska be authorized to cause the gold-dust deposited with it subject to the order of the Court in this action to be melted, assayed and shipped to the Assay Office in Seattle, Washington, and the said Bank is hereby directed to hold the proceeds thereof, less the usual charges, subject to the order of the court.”

Dated Nome, Alaska, June 5th, 1907.

ALFRED S. MOORE,

Judge District Court, District of Alaska, Second Division.

NOW, THEREFORE, by reason of the law and premises it is hereby ordered and adjudged that the plaintiff is the owner in fee and entitled to the possession of an undivided one-half ($1\frac{1}{2}$) interest of, in and to that certain placer mining claim situate in the Cape Nome Recording District, District of Alaska, known and named the Bon Voyage Claim, particularly described [126] as follows, to wit:

Commencing at the initial stake which is situated about 1,500 feet in a southerly direction from the upper end line of Creek Claim No. 3 Below on Newton Gulch, a tributary of Dry Creek, said stake being in the north end line of said claim; thence 330 feet in a westerly direction and parallel to said Newton

Gulch to corner stake No. 1; thence in a southerly direction and at right angles to corner stake No. 2; thence 660 feet in an easterly direction to corner stake No. 3; thence 1,320 feet in a northerly direction to corner stake No. 4; thence 330 feet to the initial stake or place of beginning; said claim being situated on the divide known as Gold Hill between Newton Gulch and Nome River and containing about twenty acres of placer mining ground. And that said defendants are not the owners or entitled to the possession of said interest in said claim or any part thereof, and that plaintiff has been damaged by said defendants Andrew Eadie, J. Potter Whittren and Frank H. Waskey by the withholding of possession of said premises from plaintiff and extracting gold therefrom, and it is further ordered and adjudged that plaintiff have and recover of and from said Andrew Eadie, J. Potter Whittren and Frank H. Waskey and each of them judgment in the sum of Twenty Thousand Four Hundred and Forty-one Dollars and Eighty-three cents (\$20,441.83), and the costs and disbursements of this action.

It is further ordered and adjudged that the Miners and Merchants' Bank pay into the registry of this court to the clerk thereof, to be applied upon the foregoing judgment and proceeds of the gold-dust melted and assayed under the order of this Court hereinbefore set out, and that execution may issue to carry this judgment into effect.

Done and dated in open court on this 12th day of October, 1907.

ALFRED S. MOORE,
Judge District Court, District of Alaska, Second
Division. [127]

[Endorsed]: No. 1629. In the District Court, District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Judgment. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 12, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. Vol. 5, Orders and Judgments, p. 499. Comp. ———, Attorneys for Plaintiff. J. D. 2, Page 40. McB. [128]

UNITED STATES OF AMERICA.

District Court, District of Alaska, 2d Division.

Cause No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE et al.,

Defendants.

J. J. COLE,

Trustee.

WILLIAM A. GILMORE,

Intervenor.

Praeceptum [for Transcript on Appeal].

To the Clerk of the Above-entitled Court:

You will please include in Transcript on Appeal

with the Bill of Exceptions a copy of original second amended complaint, answer of Waskey, and reply thereto, written Order of Court Oct. 29th, 1909, the mandates in this case. Also the Petition and Order to Show Cause filed by Waskey, the Demurrer by Cole, Answers of Cole & Gilmore and Replies thereto. Also the Findings, Opinion and Order of the Court. Also the Petition for Severance and Order of Severance, with all the appeal papers, and a copy of all court minutes and exceptions. Also Verdict and Judgment.

G. J. LOMEN and
WILLIAM A. GILMORE,
Attorneys for Trustee and Intervenor.

[Endorsed]: Cause No. 1629. District Court, District of Alaska, 2d Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendant. Praecipe. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jan. 14, 1913. John Sundback, Clerk. By J. A. B., Deputy. [129]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court for the District of Alaska,
Second Division.*

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

J. J. COLE, Trustee,

Respondent.

WILLIAM A. GILMORE,

Intervenor.

I, John Sundback, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 129, both inclusive, are a true and exact transcript of the Second Amended Complaint, Answer of Waskey to Second Amended Complaint, Reply to Answer of Defendant Waskey, Mandate under Rule 32 from United States Circuit Court of Appeals for the Ninth Circuit, Order of Court of October 29, 1909, Mandate from Supreme Court of the United States, Court Minutes of September 2, 1912, in re Petition and Order to Show Cause, Petition for Order to Show Cause, Order to Show Cause, Court Minutes September 3, 1912, Hearing on Order to Show Cause,

Demurrer to Petition of Frank H. Waskey, Answer of J. J. Cole to Petition of Frank H. Waskey, Answer of William A. Gilmore, Intervenor, to the Petition of Defendant Frank H. Waskey, Reply to Answer of J. J. Cole, Reply to Answer of Intervenor, William A. Gilmore, Court Minutes of September 4, 1912, Hearing on Order to Show Cause continued, Findings of Fact and Conclusions of Law, Opinion of the Court, Order filed December 20, 1912, Bill of Exceptions, Court Minutes December 28, 1912, Bill of Exceptions set for hearing, Court Minutes January 4, 1913, Settlement Bill of Exceptions continued, Court Minutes January 11, 1913, in re Bill of Exceptions, Court Minutes January 14, 1913, Bill of Exceptions settled and allowed, Assignment of Errors, Petition for an Order Allowing Appeal, [130] Order allowing Appeal and fixing Amount of Cost Bond, Cost Bond and Order, Order Enlarging Time to File Record, Petition for an Order of Severance, Order of Severance, Verdict, Judgment, and Praecipe for Transcript on Appeal, in the case of J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants, J. J. Cole, Respondent, William A. Gilmore, Intervenor, No. 1629-Civil, this court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Citation in the above-entitled cause is attached to this transcript.

Cost of transcript \$51.65, paid by William A. Gilmore, of attorneys for respondent and intervenor.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of said Court this 3d day of March, A. D. 1913.

[Seal]

J. SUNDBACK,
Clerk. [131]

*In the District Court for the District of Alaska,
Second Division.*

No. 1629.

J. J. CHAMBERS,

Plaintiff,

vs.

ANDREW EADIE, J. POTTER WHITTREN and
FRANK H. WASKEY,

Defendants.

WILLIAM A. GILMORE,

Intervenor.

J. J. COLE,

Trustee.

Citation [on Appeal—Original].

United States of America,

District of Alaska,—ss.

The President of the United States of America, to
the Defendant and Petitioner, Frank H.
Waskey, in the Above-entitled Action, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty (30) days from the date of this citation, on the 10th day of February, A. D. 1913, pursuant to an order allow-

ing appeal, entered in the office of the clerk of the United States District Court, District of Alaska, Second Division, from the final order of said Court made on the 15th day of October, 1912, and entered on the 20th day of December, 1912, in this certain suit wherein you, the said Frank H. Waskey are a defendant and petitioner, and J. J. Cole a respondent, and William A. Gilmore an intervenor, to show cause, if any there be, why the said final order made and rendered against said respondent and intervenor above named, as in said order allowing [132] appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 11th day of January, A. D. 1913, and of the Independence of the United States the one hundred and thirty-seventh.

CORNELIUS D. MURANE,

District Judge.

Attest my hand and seal of the United States District Court for the District of Alaska, Second Division, at the Clerk's Office at Nome, Alaska, this 11th day of January, A. D. 1913.

[Seal]

J. SUNDBACK,

Clerk of the United States District Court, for the District of Alaska, Second Division.

By J. Allison Bruner,

Deputy. [133]

Service by receipt of copy of foregoing citation is admitted this 11th day of January, 1913.

O. D. COCHRAN,
Of Attorneys for Petitioners. [134]

[Endorsed]: No. 1629. In the District Court for the District of Alaska, Second Division. J. J. Chambers, Plaintiff, vs. Andrew Eadie et al., Defendants. Citation. ~~Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jan. 11, 1913. John Sundback, Clerk. By J. A. B., Deputy.~~

[Endorsed]: No. 2271. United States Circuit Court of Appeals for the Ninth Circuit. J. J. Cole, Trustee, and William A. Gilmore, Intervenor, Appellants, vs. Frank H. Waskey, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Filed May 3, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

GEORGE B. BURKE, as Trustee in Bankruptcy,
for the WENATCHEE-STRATFORD OR-
CHARD COMPANY,

Appellant,

vs.

LYMAN H. WOOLFOLK,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

FILED

SEP 2 - 1913

United States
Circuit Court of Appeals

For the Ninth Circuit.

GEORGE B. BURKE, as Trustee in Bankruptcy
for the WENATCHEE-STRATFORD OR-
CHARD COMPANY,

Appellant,

vs.

LYMAN H. WOOLFOLK,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

WINFIELD R. SMITH, Esquire, #1019-21 Alaska
Bldg., Seattle, Washington,

Attorney for Trustee for the purposes of
this appeal.

WALTER M. HARVEY, Esquire, National Realty
Building, Tacoma, Washington,

Attorney for Appellee, L. H. Woolfolk.
[1*]

*In the District Court of the United States, Western
District of Washington, Southern Division.*

No. 1296.

In the Matter of the WENATCHEE-STRAT-
FORD ORCHARD COMPANY,

Bankrupt.

Stipulation [as to Preparation of Transcript].

It is hereby stipulated that the caption of all instruments, other than the first prepared, may be omitted in preparing the transcript on appeal herein, and said transcript of instruments without the caption shall be with like effect as though they were shown properly captioned in the court and cause.

Dated June 27, 1913.

WINFIELD R. SMITH,
Attorney for Creditors W. R. Prowell and F. W.
Hoffman.

WALTER M. HARVEY,
Attorney for L. H. Woolfolk.

[Endorsed]: Stipulation. Filed U. S. District Court, Western District of Washington. Jun. 27, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy. [2]

Praeipce [for Transcript on Appeal].

To the Clerk of the Above-entitled Court:

You will please prepare transcript on appeal in above matter including following: Stipulation as to omitting captions; Claim of L. H. Woolfolk with Judgment in State Court on which it is based; Confession of Judgment in Woolfolk v. Wenatchee-Stratford Orchard Co. in State Court; Minutes of First Creditors' Meeting; Objections to Claim of L. H. Woolfolk, filed April 28, 1913; Order Appointing Burke Trustee; Transcript of Evidence, except pp. 2, 3, 4, 5, 6, 37, 38, 39, 57 and 58, and first 18 lines of 59; Petition for Review; Referee's Certificate on Review; Opinion of District Judge; Order Entered Modifying Referee's Decision by District Judge; Order Permitting Appeal in Trustee's Name; Petition for Appeal, with allowance indorsed; Assignment of Errors; Bond on Appeal; Citation, Exhibit No. 1.

WINFIELD R. SMITH,

Attorney for Appellants F. W. Hoffman and W. R. Prowell in Trustee's Name.

[Endorsed]: Praeipce for Record on Appeal. Filed U. S. District Court, Western District of Washington, June 27, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy. [3]

Claim of W. H. Woolfolk and Payment on Which It is Based.

At Seattle, in said District of Washington, on the 19th day of March, A. D. 1913, came L. H. Woolfolk of Seattle, of the County of King and State of Washington, and made oath and says that Wenatchee-Stratford Orchard Company, a corporation, against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of \$46,138.84; that the consideration of said debt is as follows:

A judgment duly and regularly entered by the Superior Court of the State of Washington for Pierce County in cause No. 34,267, pending in the said Superior Court, wherein L. H. Woolfolk is plaintiff and Wenatchee-Stratford Orchard Company, a corporation, is the defendant, which said judgment was entered on the 13th day of February, 1913, and was rendered upon promissory notes made, executed and delivered by said Bankrupt and assigned to the deponent, and a copy of which said judgment is hereto annexed and made a part hereof; that no part of said debt or judgment has been paid and there are no set-offs or counterclaims to the same; that said deponent, L. H. Woolfolk, by virtue of his judgment aforesaid, has no lien upon any real estate or personal property of the above-named bankrupt, and has no prior claim over the other creditors of said bankrupt corporation by virtue of said judgment, and said deponent and claimant L. H. Woolfolk hereby offers to and does

waive and surrender any preference or priority which could or might be claimed by him against the assets of property [4] of said corporation or as against other creditors of said bankrupt corporation, and hereby disclaims any preference, right or priority against the property, assets and effects of said corporation or otherwise, and that said deponent has not, nor has any person by his order or to his knowledge or belief for his use, had or received any manner of security for said debt whatever.

[Seal]

L. H. WOOLFOLK,

Creditor.

Subscribed and sworn to before me this 19th day of March, 1913.

JASPER MAYO,

Notary Public for the State of Washington, Residing
at Seattle, King County, in Said State. [5]

Judgment [of Superior Court].

This cause coming on regularly for hearing and trial on this 13th day of February, 1913, upon plaintiff's complaint on file herein, and it appearing to the Court that the defendant has been duly and regularly personally served with summons and a copy of the complaint herein, on the 6th day of February, 1913, and has appeared in this cause and filed a confession of judgment in all respects as provided by the laws of the State of Washington, the Court having considered said complaint and confession of judgment, and having heard the testimony presented in support thereof, and having this day made and entered find-

ings of fact and conclusions of law in favor of the plaintiff and against the defendant, now on motion of Walter M. Harvey, counsel for the plaintiff;

It is hereby ordered and adjudged, that the plaintiff, L. H. Woolfolk, do have and recover of and from the defendant Wenatchee-Stratford Orchard Company, a corporation, the sum of \$46,138.84, together with the costs of this action expended and hereafter to be taxed.

Done in open court this 13th day of February, 1913.

ERNEST M. CARD,
Judge of the Superior Court.

[Endorsed]: Filed this 21st day of Mch., 1913, 11 A. M. R. F. Laffoon, Referee in Bankruptcy. [6]

*In the Superior Court of the State of Washington,
for Pearce County.*

No. 34,267.

L. H. WOOLFOLK,

Plaintiff,

vs.

WENATCHEE-STRATFORD ORCHARD COM-
PANY, a Corporation,

Defendant. [7]

Concession of Judgment [in Superior Court].

Comes now the defendant in the above-entitled action, Wenatchee-Stratford Orchard Company, a corporation, and admits that it is indebted to the plaintiff in manner and form and for the amount set

forth in plaintiff's complaint, and hereby authorizes judgment to be entered against said defendant for the sum of \$46,138.84, the same being principal, interest and reasonable attorney's fees as provided in the promissory notes set forth in plaintiff's complaint described as follows:

Upon a promissory note dated the 8th day of January, 1912, payable ninety days after date to the Scandinavian-American Bank, for the sum of \$5,000.00, with interest from Jan. 2, '13, at the rate of seven (7) per cent per annum.

Upon a promissory note dated the 30th day of April, 1912, payable ninety days after date, to the Scandinavian-American Bank, for the sum of \$5,000.00, with interest from Jan. 25, '13, at the rate of seven (7) per cent per annum.

Upon a promissory note dated the 3d day of July, 1912, payable ninety days after date to the Scandinavian-American Bank, for the sum of \$5,000.00, with interest from Dec. 30, '13, at the rate of seven per cent per annum.

Upon a promissory note dated the 13th day of April, 1911, payable on demand to D. W. King, for the sum of \$570.00, with interest from date at the rate of eight per cent per annum.

Upon a promissory note dated the 1st day of May, 1911, payable on or before six months after date to D. W. King, for the sum of \$380.00 with interest from date at the rate of eight per cent per annum.

Upon a promissory note dated the 1st day of June, 1911, payable on or before six months after date to Dennis W. King, for the sum of \$190.00, with inter-

est from date at the rate of [8] seven per cent per annum.

Upon a promissory note dated the 15th day of July, 1911, payable on or before ninety days after date, to Dennis W. King, for the sum of \$380.00, with interest from date at the rate of eight per cent per annum.

Upon a promissory note dated the 8th day of August, 1911, payable on demand to Dennis W. King, for the sum of \$570.00, with interest from date at the rate of eight per cent per annum.

Upon a promissory note dated the 13th day of April, 1911, payable on demand to George M. Brasfield, for the sum of \$1,500.00, with interest from date at the rate of eight per cent per annum.

Upon a promissory note dated the 1st day of May, 1911, payable on or before six months after date, to George M. Brasfield, for the sum of \$1,000.00, with interest from date at the rate of eight per cent per annum.

Upon a promissory note dated the 1st day of June, 1911, payable on or before six months after date to George M. Brasfield, for the sum of \$500.00, with interest from date at the rate of eight per cent per annum.

Upon a promissory note dated the 21st day of June, 1911, payable on or before six months after date to George M. Brasfield, for the sum of \$1,000.00, with interest from date at the rate of eight per cent per annum.

Upon a promissory note dated the 1st day of July, 1911, payable on or before ninety days after date,

to George M. Brasfield, for the sum of \$1,500.00, with interest at the rate of eight per cent per annum from date.

Upon a promissory note dated the 27th day of Sept., 1911, payable on demand after date to George M. Brasfield for the sum of \$1,000.00 with interest from date at the rate of eight per cent per annum. [9]

Upon a promissory note dated the 10th day of October, 1911, payable on demand after date to George M. Brasfield, for the sum of \$1,000.00, with interest at the rate of eight per cent per annum.

Upon a promissory note dated the 3d day of November, 1911, payable on demand after date to George M. Brasfield, for the sum of \$2,000.00, with interest at the rate of eight per cent per annum.

Upon a promissory note dated the 10th day of November, 1911, payable on demand after date to George M. Brasfield, for the sum of \$2,000.00, with interest at the rate of eight per cent per annum.

Upon a promissory note dated the 1st day of January, 1912, payable on demand after date to George M. Brasfield, for the sum of \$1,682.57, with interest at the rate of eight per cent per annum.

Upon a promissory note dated the 25th day of January, 1913, payable on demand after date to George M. Brasfield, for the sum of \$1,023.94, with interest at the rate of eight per cent per annum.

Upon a promissory note dated the 1st day of February, 1913, payable on demand after date to George M. Brasfield, for the sum of \$9,840.00, with interest at the rate of eight per cent per annum.

The notes aforesaid given to the Scandinavian-

American Bank having been assigned to the plaintiff, the notes to D. W. King and Dennis W. King, having been assigned and transferred to George M. Brasfield and by George M. Brasfield assigned and transferred to the plaintiff; the notes executed and delivered to George M. Brasfield having been assigned and transferred to the plaintiff. [10]

That the amount set forth in the plaintiff's complaint hereinbefore specified as the amount for which judgment is hereby confessed is now justly due and owing from the defendant to the plaintiff and no part of the same has ever been paid, and the defendant hereby authorizes the entry of judgment for costs against it upon said indebtedness.

Dated February 13, 1913.

WENATCHEE-STRATFORD ORCHARD
COMPANY,

By GEO. M. BRASFIELD,

President. [11]

State of Washington,
County of Pierce,—ss.

This is to certify that on this 13th day of February, 1913, personally appeared before me George M. Brasfield, to me personally known to be the individual described in and who on behalf of the defendant corporation executed the foregoing Confession of Judgment, and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth, and on oath stated to me that he has read the fore-

going Confession of Judgment, knows the contents thereof, and that the same is true as he verily believes, and stated to me that he had authority from said corporation to execute the same and that the attached seal is the corporate seal of said corporation.

Given under my hand and official seal the day and year in this certificate first above written.

[Notary Public Seal]

CHARLES O. BATES,
Notary Public for the State of Washington, Residing at Tacoma.

Filed in Superior Court. Feb. 13, 1913. R. E. McFarland, Clerk. By B. C. O., Deputy. [12]

*In the Superior Court of the State of Washington,
for Pierce County.*

No. 34,267.

L. H. WOOLFOLK,

Plaintiff,

vs.

WENATCHEE-STRATFORD ORCHARD COMPANY, a Corporation,

Defendant.

CERTIFICATE.

I, R. E. McFarland, County Clerk, and by virtue of the Laws of the State of Washington, *ex-officio* Clerk of the Superior Court of the State of Washington, for Pierce County, do hereby certify that the annexed is a true and correct copy of the Confession of Judgment in the above-entitled action, now on file

and of record in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of the said Superior Court, at my office, in the city of Tacoma, this 27th day of February, 1913.

[Seal]

R. E. McFARLAND,
Clerk.

By B. W. Cagley,
Deputy.

[Endorsed]: Filed U. S. District Court, Western District of Washington. May 1, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy. [13]

First Meeting of Creditors.

March 21, 1913, 11 A. M.

F. G. REMANN, Attorney for Bankrupt.

WALTER M. HARVEY, Attorney for Various Creditors.

WHITNEY & HUGHES, of Wenatchee, Atty. for Various Creditors.

W. R. SMITH, Seattle, Atty. for Various Creditors.

J. D. BENNER, Atty. for Various Creditors.

R. C. BELT, Alaska Bldg., Seattle, Atty. for Various Creditors.

J. R. DALLY, Atty. for Various Creditors.

Meeting called to order by the Referee, and object stated, and opportunity given for submitting objections to claims on question of voting for trustee.

Mr. W. R. Smith, representing Creditors F. W. Hoffman and others, objected to claim of L. H. Wool-

folk, stating his objections at length (transcript attached) to the effect that the judgment of the Superior Court of Pierce County which constituted the claim, was improperly and fraudulently procured through the unauthorized acts of G. W. Brasfield, as president of the bankrupt corporation.

Mr. Hughes of Whitney & Hughes, joined in the objections.

Whereupon the Referee determined to hear proof upon the objections as affecting the right of the claim of L. H. Woolfolk to vote on question of election of trustee.

Whereupon testimony of witnesses F. W. Hoffman and W. R. Prowell was taken in behalf of objectors and G. M. Brasfield in behalf of the claim, an adjournment being taken to the 22d March to complete the testimony. [14]

After the close of the testimony, and the matter being fully argued at length by respective counsel, the Referee overruled the objections and exceptions offered to the claim, and that the claim should be allowed for purpose of voting. Exception allowed to objectors.

On motion, the meeting then proceeded to the election of Trustee in Bankruptcy.

Claims represented as follows:

By Mr. W. M. Harvey, Attorney:

J. H. Gordon, Assignee of claim of Shurle	51.30
H. Cromwell, Assignee, claim of James Strouf	103.73
Washington Pipe & Foundry Co.....	2,198.55

W. M. Harvey, Assignee, claim of Pac. Pipe Co.....	1,185.79
R. K. Dericksen, Assignee Plough Hrdwr. Co.	2.50
L. W. Pratt, Assignee, Sunset Tel. & Tel. Co.....	4.00
Shorett, Mc— & Shorett.....	430.00
A. O. Burmeister, Assignee, Wilson Cr. L. & H. Co.....	24.15
P. L. Pendleton, Assignee Maltby & Freund	17.50
I. Strenki, Assignee, Western Union Tel. Co.	2.31
Van Dyke & Thomas.....	50.00
Morgan Wood, Assignee Bessie Creelman..	3.15
G. M. Brasfield.....	11.35
L. H. Woolfolk.....	46,138.84

J. D. Benner:

Standard Oil Co.....	1,035.07
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R. C. Belt:

Wright & Day L. Co., C. F. Bishop and G. Hunter.....	11,847.84
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E. R. York.....	100.80
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Whitney & Hughes:

C. G. Hoffman... ..	49.70
H. D. Foster.....	8.20
Carl Middleton.....	283.62

[15]

W. R. Smith, Attorney, Seattle:

W. R. Prowell.....	400.00
C. L. Moses.....	1,320.00
F. W. Hoffman.....	12,499.20

A. G. Douthitt.....	377.50
Geo. H. Blood.....	870.00

J. R. Dally, Attorney:

Geo. Adamson.....	2,240.00
Harry L. Bras.....	558.50

The roll being called by the Referee on the motion to proceed to election of Trustee, responses were made as follows: Yeas, Harvey and Dally. Noes, Benner and Belt. No voting, York, Whitney & Hughes and W. R. Smith.

The Referee declared the motion duly carried. Thereupon Mr. Harvey nominated as candidate for Trustee, Mr. George B. Burke, of the Bankers' Trust Co., Tacoma.

Mr. W. R. Smith put in nomination for said office, Mr. Fred Wright of Seattle.

Nominations being closed, roll-call resulted as follows, by the representatives of claims as above listed.

For Mr. Burke,—

Mr. Harvey	13 claims	\$50,211.82
Mr. York	1	“ 100.80

14	50,312.62
----	-----------

For Mr. Wright,—

J. E. Benner

R. C. Belt

Whitney & Hughes (By Hughes)

W. R. Smith

J. R. Dally

The Referee announced that Mr. George B. Burke had received the majority, both as to number of claims and [16] amount, and thereupon declared

him duly elected as Trustee in Bankruptcy of said estate.

Mr. Harvey moved that the bond of the Trustee be fixed at Five thousand dollars; motion seconded and carried unanimously.

On motion, meeting adjourned *sine die*.

R. F. LAFFOON,
Referee.

[Endorsed]: Filed the 24th day of March, 1913, 12
M. R. F. Laffoon, Referee in Bankruptcy. [17]

Objections to Claim of L. H. Woolfolk.

Upon the filing of the claim of L. H. Woolfolk and prior to proceedings to elect a Trustee, at the first meeting of the creditors held on March 21, 1913, Winfield R. Smith, as attorney for F. W. Hoffman and W. R. Prowell, made the following objections to the claim, and therefore to its voting at the election of Trustee, namely:

1. The claim is based upon the judgment of the Superior Court of Pierce County, Washington, entered upon confession by G. M. Brasfield, as President, in the name of the bankrupt. This confession of judgment was wholly unauthorized in fact or in law, and moreover, the larger part of the claim on which the judgment is based is Brasfield's own, assigned to Woolfolk, but without transfer of beneficial ownership. Therefore, the judgment is void.

2. Without admitting that the claim can be treated other than as an entirety but clearly to maintain the objectors' rights, it is objected that the

note of NINE THOUSAND EIGHT HUNDRED FORTY (\$9840.00) DOLLARS principal, was issued by Brasfield, as President, to himself as salary for alleged past services in managing the company. There was no contract or other sufficient foundation to sustain this note, and moreover, this salary was voted solely by Brasfield and his wife as two of the three trustees, and therefore it is not good. Also, the final meeting at which the amount of the salary was fixed and the note issued was attended only by Brasfield and his wife, without any notice at all to Hoffman, the third member of the Board.

WINFIELD R. SMITH,

Attorney for Hoffman and Prowell. [18]

[Endorsed]: Filed U. S. District Court, Western District of Washington. Apr. 28, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy. [19]

Order Appointing Burke Trustee.

At Tacoma, Washington, in said District, on the — day of March, A. D. 1913, before R. F. Laffoon, Esq., Referee in Bankruptcy.

On the 21st day of March, 1913, the day appointed by the Court for the first meeting of creditors in the above Bankruptcy and of which due notice has been given in "The Tacoma Daily Ledger" as required by the order of this Court, this matter coming on regularly to be heard and the hearing thereon having been continued until the 22d day of March, 1913, and the majority in number and amount of claims of the creditors of said bankrupt whose claims have been

allowed and who were present at said meeting having appointed by a vote duly taken, George B. Burke, of the city of Tacoma, and county of Pierce, and State of Washington, to be the trustee of said bankrupt's estate and effects, the Court having considered said selection of trustee and being fully advised in the premises;

It is hereby ordered that the above appointment of trustee be and the same is hereby approved, ratified and confirmed.

R. F. LAFFOON,
Referee in Bankruptcy.

[Endorsed]: Filed this 24th day of Mch., 1913. 4
P. M. R. F. Laffoon, Referee in Bankruptcy. [20]

**Transcript of Testimony and Proceedings at First
Meeting of Creditors.**

[Testimony of F. W. Hoffman.]

Mr. F. W. HOFFMAN, being called and sworn,
testified as follows:

Direct Examination.

(By Mr. SMITH.)

Q. Your full name?

A. Fred W. Hoffman.

Q. You are a member of the Board of Trustees of the alleged bankrupt here, the Wenatchee-Stratford Orchard Company? A. Yes, sir.

Q. How long have you been such trustee?

A. Well, I have been on the Board ever since it started.

Q. Since the Company was formed?

(Testimony of F. W. Hoffman.)

A. Yes, sir.

Q. About when was that?

A. Oh, about three years ago.

Q. How many members are there on the Board of Trustees? A. Three.

Q. Who are the other members?

A. Mr. and Mrs. Brasfield.

Q. That is you mean Mr. Brasfield and his wife?

A. Yes, sir.

Q. Who are the officers of the corporation?

A. The three of us are the officers.

Q. What officers? A. I am secretary.

Q. And who is president and treasurer?

A. Mr. Brasfield is president.

Q. And have you attended all the recent meetings of the Board of Trustees, do you know?

A. I do not know. [21]

Q. Have you attended all the meetings of the Board of which you had notice?

A. Notice by mail?

Q. Yes, by any notice; the prescribed notice?

A. I think I have.

Q. Did the question ever come up at a meeting of the Board of Trustees as to this suit that was instituted by Mr. Woolfolk on these notes, the foundation of this claim of Mr. Woolfolk in this matter?

A. Not at any meeting that I was at.

Q. Then did the question of confessing the judgment ever come up? A. No, sir.

Q. Did any question authorizing any officer to confess any judgment ever come up before the Board?

(Testimony of F. W. Hoffman.)

A. No, sir.

Q. When, if ever, did you first learn of the confession of judgment by Mr. Brasfield?

A. I had an appointment with Mr. Brasfield,—(interrupted).

Q. Never mind the details.

A. When did I first learn?

Q. Yes, sir.

A. On the 26th or 27th of February.

Q. This last February?

A. Yes, about that time; I am not positive as to the exact time.

Q. Was it before or after judgment had been confessed and in fact entered? A. After.

Q. Has the matter of these bankruptcy proceedings ever come up at any of the meetings of the Board of Trustees? [22]

A. Not while I was there.

Q. You have attended all the meetings?

A. That I had notice of lately.

Q. Do you know of any meeting of the Board of Trustees that you did not attend, whether regularly called or not? A. I do not.

Q. Then was there ever any authorization at any meeting of the Board of Trustees to Mr. Brasfield to admit in the name of the Company, by answer or otherwise, the allegations of the petition of the creditors here, for bankruptcy

A. Not to my knowledge.

Q. When did you first hear in fact of such an answer having been put into the bankruptcy court by Mr. Brasfield?

(Testimony of F. W. Hoffman.)

A. About the 27th day of February.

Q. Was it at this same time you have already spoken of? A. Yes, sir.

Q. Did Mr. Brasfield tell you of these things then?

A. No, sir.

Q. Has he ever told you of them?

A. Only that we talked of it a few days ago.

Q. Subsequent to the 27th or 28th of February?

A. Yes, sir.

Mr. SMITH.—Now, it would facilitate matters very much if we could have the record-book at this time.

Mr. HARVEY.—I have sent for it and it will be here in a minute.

Mr. SMITH.—That is all I have to examine the witness on, on this particular branch. [23]

Cross-examination.

(By Mr. HARVEY.)

Q. Do you know what Mr. Brasfield's powers were as president of the company? A. Yes, sir.

Q. What were they?

Mr. SMITH.—I would suggest that it would be very much more satisfactory if we could start out with the record-book, by-laws, and so forth, before us.

The COURT.—I suppose they will be here shortly.

Q. Do you know what Mr. Brasfield's powers were?

A. Well, I doubt if I can name them right off-hand.

Q. Well, what is your idea of his powers?

(Testimony of F. W. Hoffman.)

A. He had the power to go ahead and do business, full power.

Q. Full power? A. Yes.

Q. To do anything in any connection with the corporation that he wanted to do?

A. Well, I did not understand that it was anything, but anything that was necessary and should be done in the way of looking after the property.

Q. Anything in connection with the business of the corporation, giving notes and obligations, taking care of the debts and the whole management of the corporation was vested in him; you knew that, didn't you?

A. Yes.

Q. You live at Wenatchee? A. Yes.

Q. And Mr. Brasfield lived here in Tacoma?

A. Yes, sir. [24]

Q. Who actually conducted the operation of the company?

A. Mr. Brasfield has for two years and a half.

Q. He purchased supplies for the company, raised money for the company, didn't he? A. Yes.

Q. And advanced the money himself for the company; do you know of those things?

A. He told me he had advanced money.

The COURT.—You don't know it of your own knowledge?

A. Only what he told me; that is all.

Q. (By Mr. HARVEY.) Do you remember being present at the meeting of the Board held in the office of E. R. York, attorney of Tacoma, on the 24th of February, 1912?

(Testimony of F. W. Hoffman.)

A. I remember of being at a meeting; I am not positive as to the date.

Q. I call your attention to this book, and ask you if on page 21 this is your signature over the word "Secretary." A. Yes, sir.

Q. Can you identify this as the minute-book of the corporation? A. Yes, sir.

Mr. HARVEY.—We offer in evidence the minutes of the meeting of the Board of Trustees of the Wenatchee-Stratford Orchard Company, held February 24, 1912, as contained in this book.

Mr. SMITH.—Of course, if this were a Court trial, I would reserve objections, but it makes no difference as it encumbers the record. I think it is not material, either in law or in fact.

The COURT.—It may be admitted.

Mr. HARVEY.—I will read into the record, that part of it. [25]

(Reads record as follows:)

"Tacoma, Washington, February 24, 1912.

A special meeting of the Board of Trustees of the Wenatchee-Stratford Orchard Company was called and held at the office of E. R. York, Fidelity Building, in the City of Tacoma, Washington, on this date, at 11 A. M., at which there were present all of the Trustees of the Company, and by unanimous consent any other notice of the meeting was waived and all consented to the holding of the meeting at this time or place.

The president then submitted to the meeting certain proposed amendments to the by-laws of the

(Testimony of F. W. Hoffman.)

Company, which were severally read, and each and all of them having been fully discussed and considered, thereupon the said amendments, upon motion duly carried, were approved and adopted, as follows:

‘To strike out all of Section 1, Article 3, and substitute in lieu thereof the following: The president shall preside at the meetings of the stockholders and trustees, and shall call the trustees together whenever he may deem necessary. He shall sign with the secretary all certificates of stock; he shall have the general charge, control and management of the property, business and affairs of the company; he shall have power to incur any liabilities and indebtedness of the company which may be necessary in carrying out the business operations of the company, and he shall have power to sign, acknowledge and deliver in the name of the company all deeds, contracts, leases, mortgages and other obligations and instruments in writing of the company.’ ” [26]

There are other matters following, but I will not read those matters which are immaterial. The minutes are signed, F. W. Hoffman, Secretary; George M. Brasfield, President.

Q. Do you remember, Mr. Hoffman, being present at the meeting in the National Realty Building on the 30th of January, 1913, at which you and Mr. Brasfield and Mrs. Brasfield constituting the Board of Trustees were present?

A. Yes, sir, although I am not positive as to the date; but there was a meeting about that time.

Q. Do you remember the following resolution being

(Testimony of F. W. Hoffman.)

presented and unanimously passed:

“Resolved that the action of the president of the corporation in incurring the indebtedness hereinafter set forth and in giving the notes herein mentioned, be and the same is hereby in all respects approved, ratified and confirmed, and said indebtedness is hereby accepted as the indebtedness of this corporation, and said notes are hereby recognized and sanctioned as the legal and just debts and obligations of this company. The notes and indebtedness hereby ratified and confirmed, covered by this resolution, are as follows:

F. W. Hoffman, September 1st, 1911.....	\$1694.80
F. W. Hoffman, October 5th, 1911.....	633.00
F. W. Hoffman, June 15th, 1912.....	3999.50

Total.....	6327.30
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Interest at eight per cent. from above dates.

W. R. Prowell, September 18th, 1911.....	400.00
--	--------

Interest on above at eight per cent. from
above date. [27]

Scandinavian-American Bank, January 8,

1912	\$5,000.00
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Scandinavian-American Bank, April 30th

1912.....	5,000.00
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Scandinavian-American Bank, July 5th,

1912.....	5,000.00
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Overdrawn \$75.77. Total, \$15,075.77

Interest on above at seven per cent. from
last date of maturity.

George M. Brasfield, September 27, 1911..	1,000.00
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George M. Brasfield, October 10.....	1,000.00
--------------------------------------	----------

(Testimony of F. W. Hoffman.)

George M. Brasfield, October 3d.....	2,000.00
“ November 10, 1911..	2,000.00
“ January 1st, 1912..	1,682.57
“ January 25th.....	1,023.94

Total..... 8,706.51

Interest at eight per cent. on above from above dates.”

Q. Do you remember that resolution carrying unanimously and you and Mrs. Brasfield and Mr. Brasfield all voting in the affirmative?

A. I would like to look at the amounts there.

Q. I am referring to pages 20 to 23 of the minute-book. A. I do.

Q. I call your attention to this waiver of notice on page 22 of the minute-book. That is your signature to that waiver of notice, isn't it?

A. Yes, sir, that is my signature.

Q. You remember that waiver being signed there by all the trustees? A. Yes, sir.

Mr. HARVEY.—We offer in evidence this waiver of notice on page 22 as follows:

“WAIVER OF NOTICE.”

“We, the undersigned trustees of [28] the Wenatchee-Stratford Orchard Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, do hereby waive notice of the time and place of holding the special trustees' meeting, and waive notice of the object for which the meeting was called, and hereby consent that the meeting of the trustees of said corpora-

(Testimony of F. W. Hoffman.)

tion be held on the 30th day of January, 1913, at 11:30 A. M., at 1307 National Realty Building in the City of Tacoma, Washington, and that any business affecting the interest of said corporation may be discussed and acted upon at said meeting.

(Signed) GEORGE M. BRASFIELD,
F. W. HOFFMAN,
VIRGIE E. BRASFIELD,
Trustees."

Q. Do you remember of the following resolution being presented at that meeting:

"Resolved, that the salary of George M. Brasfield, president of this Company, from the date when he became president, to be fixed at the sum of one thousand dollars per month, the same to include all his services as president of the company, not only in managing and directing its affairs, but also in the matter of securing moneys to be advanced by the Scandinavian-American Bank of Seattle, and other persons, including himself, and the president is authorized and directed to pay himself out of any funds of the company which may come into his possession, his salary aforesaid."

Do you remember that resolution being presented and two trustees voting affirmatively and you voting in the [29] negative? A. Yes, sir.

Q. That is correct, isn't it? A. Yes.

Q. That is on page 24 of the record. And not only was Mr. Brasfield given the full power to manage the concerns of the company, but, as a matter of fact, he actually did so, didn't he?

(Testimony of F. W. Hoffman.)

A. Yes, sir; he managed it.

Q. And you knew comparatively little about the details of the management of the business; isn't that correct? A. Yes, sir.

Q. The only thing that you knew about the conduct of the business was through such letters as Mr. Brasfield might write you, or when you were over here and you would talk some matters over?

A. Yes, sir.

Q. The responsibility for the conduct of things was left to him? A. Yes, sir.

Q. If a note was to be given in connection with the operations of the company, it was not customary to consult with you in regard to it?

A. He never did.

Q. If it was a matter of buying some pipe or things of that kind, unless you happened to be here, that would not be discussed?

A. I never heard anything about it.

Q. If it became a matter of the company needing money and he had to go to the bank to borrow money, that would not be [30] discussed with you? A. No, sir; it was not discussed.

Q. If it became necessary for Mr. Brasfield to go down into his private funds and advance money to carry on the business of the company, it was not usual or customary to advise with you in regard to it?

A. I never heard of it.

Q. Did he repeatedly write to you asking you to contribute toward maintaining the company?

Mr. SMITH.—I think even in such a proceeding as

(Testimony of F. W. Hoffman.)

this, we should not prove the contents of letters in that way.

Q. Have you the letters which you have received from time to time from Mr. Brasfield?

A. I have, yes.

Q. Are they here?

A. No, sir; part of them are here.

Q. You brought part, and left part of them home? A. Part of them are in Seattle.

Q. Are all that you received either here or in Seattle?

A. I don't know; I think some are in the Wenatchee office.

Q. You are not sure about that?

A. I am not sure about that.

Q. Do you remember being called upon repeatedly by Mr. Brasfield to aid and join in meeting the obligations of the company *where* were due and pressing?

Mr. SMITH.—I object to the question on the same ground as above noted.

(Objection withdrawn.)

Q. Do you remember Mr. Brasfield repeatedly saying to you in person that he would like to have you help him to support [31] and maintain the company and contribute money to carry on its business operations?

A. He has asked me to contribute money, yes.

Q. Which you either would not or could not do?

A. I contributed some.

Q. But not all that he wanted? A. No, sir.

(Testimony of F. W. Hoffman.)

Q. Not all that you were called upon for?

A. No.

Q. Then if this confession of judgment was made by Mr. Brasfield without consulting you, it was just like all the other business of the company, was it?

Mr. SMITH.—I object to that.

(Objection withdrawn.)

(No audible response.)

Direct Examination.

(By Mr. SMITH.)

Mr. SMITH.—I will introduce in evidence this letter to Mr. Hoffman, as to a suit by the bank for the collection of a note, signed by G. M. Brasfield.

(Received.)

Q. Mr. Hoffman, referring to the record of the meeting of the Board of Trustees of January 30, 1913, the minutes of which have been read, being on page 23 of the record book, if I understood the question of Mr. Harvey, he asked you whether you voted for the resolution confirming the various indebtedness, and ratifying and confirming that indebtedness, including various notes to Mr. Brasfield; I would ask you whether among that list of notes any one [32] was for salary?

A. I did not understand it was for salary, no, sir.

Mr. HARVEY.—And they were not.

Mr. SMITH.—Oh, very well. I would like now in connection with the testimony of this witness and the record evidence that has gone in, to read into the record the minutes of the meeting held on the first

(Testimony of F. W. Hoffman.)

day of February, 1913, set out on page 25 of the record book.

Mr. HARVEY.—No objection.

Mr. SMITH.—I will read as follows: “A meeting of the Board of Trustees of the Wenatchee-Stratford Orchard Company was held at Tacoma, on the first day of February, 1913, present George M. Brasfield and Virgie Elder Brasfield, constituting a majority of the Board of Trustees of said company, whereupon Virgie Elder Brasfield presented the following resolution: Whereas Mr. H. A. Hoffman has objected to the salary allowed to Mr. George M. Brasfield, by the resolution heretofore passed by the company, therefore, be it resolved that the salary of George M. Brasfield, from the date of his election to the present time, be, and the same is hereby fixed at the sum of \$9,840.00, and the president of this company is authorized to make, execute and deliver to the said George M. Brasfield a note for said sum.

Thereupon the meeting adjourned.

G. M. BRASFIELD,
Acting Secretary.”

Q. Did you have notice of the meeting, Mr. Brasfield? A. No, sir.

Q. Did you know in advance of this action that was taken, that it was to be taken? [33]

A. No, sir.

Q. Did you ever know informally or otherwise of that action? A. The salary action?

Q. Authorizing the note for \$9,840.00 to Mr. Brasfield for salary? A. No, sir.

(Testimony of F. W. Hoffman.)

Q. I see this resolution refers to the salary of Mr. Brasfield from the date of his election to the present time. Can you tell me offhand when he was elected president?

A. I could not exactly, but about September 15, 1911.

Mr. SMITH.—In that connection I would like to read into the record the minutes of the meeting of the Trustees of the Wenatchee-Stratford Orchard Company, according to the record, on the 18th of September, 1911, and recorded in the minutes on page 19 of the record book, as follows: "Minutes of meeting of the Trustees of the Wenatchee-Stratford Orchard Company. A meting of the trustees of the Wenatchee-Stratford Orchard Company was held in the City of Seattle, King County, Washington, upon the 18th of September, 1911, immediately following the special meeting of the stockholders, at which were present all the trustees of the company. It was thereupon moved and seconded and carried that George M. Brasfield be elected as president and treasurer of the corporation to succeed D. W. King, who had ceased to be a stockholder of the Company. It was thereupon moved and seconded and unanimously carried that pursuant to the unanimous vote of the stockholders at the stockholders' meeting of said company held on the 18th of September, 1911, that article 6 of the articles of incorporation of this company be amended to read as [34] follows: 'Article 6, That the principal place of business of this corporation shall be the City of Seattle, County of

(Testimony of F. W. Hoffman.)

King, State of Washington,' and that the Secretary certify said amendment in triplicate under the seal of said corporation as required by the laws relative to amendments of articles of incorporation.

Upon motion it was regularly ordered that the president be and he is hereby authorized and directed to borrow the sum of ten thousand dollars, and to execute and deliver to said ——— promissory note of said corporation for said sum, payable on or before, ———, bearing interest from date, at the rate of eight per cent per annum.

The resignation of F. W. Hoffman, as Treasurer of said Wenatchee-Stratford Orchard Company, was presented and accepted by said Trustees.

(Signed) GEORGE M. BRASFIELD,

President.

Attest: F. W. HOFFMAN,

Secretary."

Q. I would like to ask as the minutes do not make it expressly clear, whether Mr. Brasfield at that time was elected president? A. I think he was.

Q. And that was the same date of the stockholders' meeting which had been held? A. Yes.

Q. Then, when the resolution that I read before for the paying of salary, giving a note of \$9,840.00 to Mr. Brasfield for salary, from the date of his election, refers in there to the date of his election, it means substantially this date, September 18, 1911? [35]

A. Yes, sir.

Q. And he continued throughout that time as president? A. Yes.

(Testimony of F. W. Hoffman.)

Q. That would be then some 17 months?

A. Some 17 months.

Q. Which would be at the rate of about six hundred dollars a month salary? A. Yes, sir.

Q. Is it your understanding from what you have learned since as to the reduction of the salary, that he reduced from one thousand dollars to six hundred dollars? A. I do not understand you.

Q. Is that your understanding as you have learned since that meeting that that is what he did, to reduce his salary from one thousand dollars a month to six hundred dollars a month? A. Yes, sir.

Q. Did anybody else, that is other officers, receive a salary, that is, not employees, but officers?

A. No, sir.

Q. Never at any time?

A. No, sir. Well, let me see; there were some other officers paid for actual work done on the project, for certain trips.

Q. Piece work? A. Yes, sir.

Q. Never any salaries paid?

A. No regular salaries.

Q. Was there a by-law on that subject?

A. I am not sure.

Mr. HARVEY.—No other officer other than president, it provides. [36]

Mr. SMITH.—I want to go into the matter of the size of the business and operation and profits, as this salary matter has come up.

Q. You have testified that the company was about three years old, and the capital is one hundred and

(Testimony of F. W. Hoffman.)

fifty thousand dollars. A. Yes, sir.

Q. That was paid how, in property or money?

A. In property.

Q. Speaking broadly, without details, what are the property assets of the company? A. Land.

Q. How many acres?

A. About sixteen or seventeen hundred acres.

Q. Located where?

A. Near Stratford, Grant County.

Q. Are the lands practically all together in one general location? A. Yes, sir.

Q. What is the business of the company—it is an irrigation company, isn't it?

A. Irrigation and selling and improving land.

Q. Did you carry on any sort of a general business other than the matter of improving these lands and selling them? A. No, sir.

Q. Has Mr. Brasfield sold any of these lands?

A. Not to my knowledge.

Q. Who did sell them?

A. There was a selling agent before Mr. Brasfield was president; that was prior to that time.

Q. Selling agency contract? [37]

A. Yes, sir.

Q. About how much land have been sold in all?

A. In the neighborhood of 190 acres.

Q. And broadly speaking, who sold this?

A. The sales agents; I think they sold all of it.

Q. Mr. Brasfield sold none? A. No.

Q. Did Mr. Brasfield devote his time to cultivating these lands?

(Testimony of F. W. Hoffman.)

A. He had been out there quite a bit.

Q. I am asking about himself, his individual time?

A. Not that I know of.

Q. Where did he reside all this time?

A. In Tacoma, so far as I know.

Q. Did he spend a large portion of his time over at these lands near Stratford?

A. He spent sometime there, I understand; he would go there for a week or two weeks at a time.

Q. Your own home is at Wenatchee?

A. Yes, sir.

Q. Did you ever see him there for a long period of time? A. No, sir.

Q. Did the company have its own office here in Tacoma?

A. Not to my knowledge. Mr. Brasfield had an office here.

Q. Was there any particular office work that had to be done, taking a considerable amount of a man's time here or in Seattle or anywhere for the company?

A. There would be some.

Q. Would it be a considerable amount?

A. I would not think so, no. [38]

Q. Did you do any of that work yourself?

A. I did some of it; that is before the company was turned over to Brasfield.

Q. He did what was done after it was turned over to him? A. Yes.

Q. Had it ever been proposed before these meetings, the minutes of which have been read, that he should have a salary?

(Testimony of F. W. Hoffman.)

A. The only thing mentioned about a salary was when he was elected president. I think I mentioned it and he said, well, we won't bother about any salary.

Q. Was the matter ever brought up in the meetings of the directors after that until what has been read?

A. No, sir, I do not remember of it.

Q. Did the company ever declare dividends?

A. No, sir.

Q. Did it ever make any profits?

A. Well, I would not hardly know how to answer that.

Q. Was there ever any money available for dividends? A. No, sir.

Q. Who was directly in charge of the Orchard work over there at Stratford?

A. For the last year and a half?

Q. During Mr. Brasfield's presidency?

A. Mr. Dudley.

Q. An employee of the company? A. Yes.

Q. Foreman or something of that kind?

A. Foreman.

Q. He devoted all his time to it?

A. He lives on the property. [39]

Q. Was there any special amount of work required to be done on the property by the president over and above what Mr. Dudley did?

A. I would not think so.

Q. Who is this third member of the Board of Trustees, Virgie Brasfield—what, if any, relation to Mr. Brasfield? A. I think she is his wife.

Q. Did she ever take any active part in the man-

(Testimony of F. W. Hoffman.)

agement of the company?

A. Not to my knowledge.

The COURT.—Did she attend director's meetings?

A. Yes, sir, the two I attended.

Q. (By Mr. SMITH.) She was present at two?

A. Yes, the only two I attended in Tacoma.

Mr. SMITH.—I wish to read into the record a portion of the minutes bearing upon the question we are now considering, being a special meeting of the stockholders of the company, shown by the record to have been held on this same 18th day of December, 1911, as follows, being at page 17: "It was moved and seconded and carried unanimously that Article 6 of said by-laws be amended to read as follows: Members of the board of trustees except the president shall receive no compensation for service as such nor shall the corporation be held liable for any services rendered by said members except the president, except it is expressly provided by resolution passed by the Board of Trustees authorizing or ratifying the same; Provided, however, that members of the Board shall be allowed their reasonable traveling expenses when actually engaged in the business of the company, the [40] same to be audited and allowed as in other cases of demands against the company. The treasurer and other employees shall receive such compensation as the Board of Trustees shall determine. The president of the company shall receive a compensation of \$—— per annum payable ——."

Q. The resolution was adopted in that form, was it,

(Testimony of F. W. Hoffman.)

leaving a blank for the amount of annual compensation and the mode of payment?

A. I do not remember that resolution.

Q. State whether or not it was at this time that Mr. Brasfield made the remark you have testified to that you need not bother about salary.

A. Yes, sir, the way I remember it, it was at this time when we had that meeting at Seattle.

Mr. SMITH.—That is all at this time. However, I would like to ask: There does not appear in the record of this book any meeting being held subsequent to this meeting of February 1, 1913, which has been read into the record. Do you know of any subsequent meeting? A. No, sir.

Q. You received notice of none? A. No, sir.

Cross-examination.

(By Mr. HUGHES.)

Q. Is this resolution that was passed at the meeting of the 30th of January, 1913, in which Mr. Brasfield's salary was fixed at one thousand dollars, the record recites that Virgie Elder Brasfield moved the adoption of the foregoing [41] resolution which was seconded and voted and declared carried. Do you recall how the vote stood at that time?

A. Yes, sir.

Q. How was it?

A. Two in favor of the salary and one against it.

Q. And who voted in favor of it?

A. Mr. and Mrs. Brasfield.

Q. And who voted against it?

(Testimony of F. W. Hoffman.)

A. I voted against it.

Q. Were Mr. and Mrs. Brasfield the other two trustees? A. Yes.

Q. Mr. Brasfield voted in favor of the granting of his salary to that amount? A. Yes, sir.

Q. I understand you were not present at the meeting of the first of February at which his salary was reduced? A. No, I was not.

Redirect Examination.

(By Mr. HARVEY.)

Q. Now, Mr. Hoffman, if all of the business was carried on by Mr. Brasfield without your being informed as to it, you cannot tell now what arduous duties he performed in connection with his office as president, can you?

Mr. SMITH.—I think that is purely argumentative.

The COURT.—Counsel may be leading up to something else.

Q. As a matter of fact you do not know what Mr. Brasfield was doing in the conduct of the business, do you?

A. I know that he went over there occasionally.

Q. I did not ask you that, but you do not know what he did [42] as the president, do you; you have already sworn under oath that you did not know, have you not?

A. No, I do not know what was going on.

Q. Then you do not know what he did?

A. I do not know everything about it.

(Testimony of F. W. Hoffman.)

Q. Then you cannot tell this Court whether he earned a salary of one thousand dollars a month, can you? A. I do not know.

Q. Now, you have testified that these sales of land resulting in a profit to the company were through sales agency; do you know what Mr. Brasfield had to do with that?

A. That was sold prior to the time Mr. Brasfield was president.

Q. Do I understand you to say no land was sold since Mr. Brasfield was president?

A. I do not remember of any.

Q. Do you know? A. Not positively.

Q. Will you tell the Court whether you know anything about it, what land, if any, was sold?

A. No, I do not know.

Q. Then you do not know anything about that?

A. I do not know anything about that.

Q. Now Mr. Brasfield as president of the company lived in Pierce County? A. Yes, sir.

Q. And had an office in the Perkins Building where he handled the business of the Wenatchee-Stratford Orchard Company? A. I could not say.

Q. And all the business of the company was transacted from that office? [43]

A. So far as I know.

Q. Who was president when Mr. Brasfield made this remark to you about, never mind about salary?

A. That was at the time we had that meeting.

Q. Who was there?

A. Mr. Prowell and Brasfield and myself.

(Testimony of F. W. Hoffman.)

Q. The resolution was passed contemplating a salary for the president, but leaving it blank, to be fixed at another time; was that the way you understood it?

A. No, sir; I do not remember it that way.

Q. All you know is that the resolution was passed there; that his salary was to be fixed at blank dollars, from blank? A. Yes, sir.

Q. Now, look at these notes which I show you and see if your name appears on every one of those obligations, which is part of the claim put in judgment? A. Yes, sir, it does.

Q. All of those notes are notes of the company which you signed?

A. I signed them as secretary.

Q. Now, this was prior to the time that Mr. Brasfield took charge of all the property and management of the company? A. Yes, sir.

Q. Up to that time when you and Mr. King and Mr. Prowell were running the company, you signed the notes, did you not? A. Yes, sir.

Q. After Mr. Brasfield came in you signed no notes at all, is that correct? A. Yes, sir.

Q. Now, then, you don't question the genuineness of every one of [44] those notes, do you?

A. No, sir.

Q. Or that they are valid obligations of the Wenatchee-Stratford Orchard Company, do you?

A. No, sir.

Q. At this meeting in the Realty Building, you voted along with Mr. and Mrs. Brasfield to ratify all of the other indebtedness embodied in this judg-

(Testimony of F. W. Hoffman.)

ment here, except the salary, didn't you?

A. Yes, sir.

Q. Then all the notes of the Scandinavian Bank assigned to Mr. Woolfolk and every one of these notes of Brasfield, you have either put your name to or ratified, except the salary one?

Mr. SMITH.—Please identify these notes.

Q. The first note you testified to is for fifteen hundred dollars, dated May 13, 1911, payable on demand, signed Wenatchee-Stratford Orchard Company by Dennis W. King, president, F. W. Hoffman, secretary? A. Yes, sir.

Q. And the next is for \$190.00, June 1, 1911, payable on or before six months, signed Wenatchee-Stratford Orchard Company by Mr. King, president, and F. W. Hoffman, secretary and treasurer. That is your signature and that is the note of the company, isn't it? A. Yes, sir.

Q. The next note is for \$570.00, dated Wenatchee, Washington, August 8, 1911, signed Wenatchee-Stratford Orchard Company by the same officers as the other, and payable on demand, and that also is your signature and that is an obligation [45] of the company? A. Yes, sir.

Q. The first notes bears interest at the rate of eight per cent, and the second one at seven per cent, and the third at eight per cent? A. Yes.

Q. The next is a note for \$570.00, dated Wenatchee, April 13, 1911, to the order of D. W. King, payable on demand, interest eight per cent, signed by Dennis W. King, president, F. W. Hoffman, secre-

(Testimony of F. W. Hoffman.)

tary. That is your signature, and that is the just obligation of the company? A. Yes, sir.

Q. And the next is \$380.00, dated Wenatchee, Washington, May 1, 1911, to the order of D. W. King, payable on or before six months, signed by the Wenatchee-Stratford Orchard Company, by Dennis W. King, president, F. W. Hoffman, secretary, bearing interest at eight per cent. That is your signature and the obligation of the company?

A. Yes, sir.

Q. And the next \$380.00, dated at Wenatchee, July 15, 1911, payable on or before ninety days, to the order of Dennis W. King, bearing interest eight per cent, signed by the Wenatchee-Stratford Company, by Dennis W. King, president, and F. W. Hoffman, secretary. That is your signature and that is a just and valid obligation of the company?

A. Yes, sir.

Q. A note for fifteen hundred dollars, dated Wenatchee, Washington, July 1, 1911, payable to the order of George M. Brasfield, on or before ninety days, with interest at [46] eight per cent, signed Wenatchee-Stratford Orchard Company by Dennis W. King, president, and F. W. Hoffman, secretary and treasurer; and the next is a note of one thousand dollars, dated Wenatchee, Washington, June 21, 1911, payable to the order of George M. Brasfield, on or before six months, with interest at eight per cent, signed Wenatchee-Stratford Orchard Company by D. W. King, president and F. W. Hoffman, secretary; those are the just and valid obligations of the com-

(Testimony of F. W. Hoffman.)

pany and signed by yourself?

A. Yes, sir.

Q. A note of five hundred dollars, dated June 1, 1911, to the order of George M. Brasfield, payable on or before six months, with interest at eight per cent, signed Wenatchee-Stratford Orchard Company by Dennis W. King, president, and F. W. Hoffman, secretary. That is your signature and a just and valid obligation of the company?

A. Yes, sir.

Q. And a note for one thousand dollars dated Wenatchee, Washington, May 1, 1911, payable to the order of George M. Brasfield, on or before six months, with interest at eight per cent, signed Wenatchee-Stratford Orchard Company by Dennis W. King, president, and F. W. Hoffman, secretary. That is your signature and that is a just and valid obligation of the company? A. Yes, sir.

Whereupon an adjournment was taken until 10:15 A. M. [47]

10:15 A. M., Saturday, March 22, 1913.

Mr. F. W. HOFFMAN, being recalled for further cross-examination, testified as follows:

Further Cross-examination.

(By Mr. HARVEY.)

Q. I have called your attention to all these notes of the Wenatchee-Stratford Orchard Company which you signed, and I have also called your attention to the fifteen thousand dollars worth of notes of the Scandinavian-American Bank, assigned to Mr. Woolfolk, and the other notes of Mr. Brasfield, ag-

(Testimony of F. W. Hoffman.)

gregating \$8,706.51, which you as one of the trustees approved. So that you are willing to say, are you not, that all of these notes represented in this judgment are the valid, subsisting obligations of the company, your only *objecting* being to the salary note.

A. Why, I have not seen all of them.

Q. I am not talking about seeing notes, but about the obligations. That is, you voted to approve and ratify the indebtedness of the bank, fifteen thousand dollars and interest, and to ratify the notes issued by Mr. Brasfield to himself for money advanced, \$8,706.-51, at the same time your obligation was approved, so that you voted to approve those in addition to those which you signed. There is no question about that? A. Yes, sir.

Q. Then you have no objection to any part of the judgment entered there on any of the notes except the one salary note? [48]

Mr. SMITH.—I object to that question. That is a mixed question of fact and law.

Mr. HARVEY.—I will change the form of the question.

Q. You have, therefore, as secretary of the Wenatchee-Stratford Orchard Company and as a member of the Board of Trustees, approved and ratified each and all of the notes which are in controversy in that judgment except the one for nine thousand eight hundred and forty dollars for salary?

Mr. SMITH.—I object to the question. They have not shown of what that judgment is made up.

(Testimony of F. W. Hoffman.)

There is nothing before the Court to show that the judgment consists of these notes that counsel has shown to the witness, plus the salary note.

(Question withdrawn.)

Q. If it should transpire in these proceedings that this judgment is made up of these notes, which you signed as secretary, plus the notes which you ratified at the meetings of the Board, then you recognize as a creditor and as secretary of the company, all of those obligations except the salary note; do you understand what I am getting at? A. I think I do.

Q. Well, as I do not know all of what the judgment consists, but I say, supposing it consists of those things.

A. I would like to have the question read.

(Question read.)

A. I recognize all of the obligations that I signed as secretary and that we ratified at the meetings.

Q. I think that is all.

(Witness excused.) [49]

The COURT.—*No*, Mr. Harvey, you have presented claims of about fifteen thousand dollars and interest on behalf of the bank?

Mr. HARVEY.—Yes, \$8,706.51, with interest, which consisted of notes issued to Brasfield after he became president; and these various notes which I read into the record issued to Mr. King and others before Mr. Brasfield became connected with the concern.

The COURT.—I figure those up at \$7,590.00.
[50]

Mr. HARVEY.—I will call Mr. Brasfield.

[Testimony of G. M. Brasfield.]

G. M. BRASFIELD, being called and sworn, testified as follows:

Direct Examination.

(By Mr. HARVEY.)

Q. Your name is George M. Brasfield?

A. Yes, sir.

Q. You were president of the Wenatchee-Stratford Orchard Company? A. I was.

Q. When did you become president as near as you can remember?

A. Some time in September, 1911.

Q. Did you continuously act as president from that time in September, 1911, until the bankruptcy proceedings in this case? A. I did.

Q. I call your attention to three notes for five thousand dollars each, made payable to the order of the Scandinavian-American Bank on January 8, 1912, April 30, 1912, and July 3, 1912, and ask you to state what the consideration for those notes was, and whether they were given by the Wenatchee-Stratford Orchard Company in the usual and ordinary course of business.

A. The amounts were for five thousand dollars each; they were given in the usual course of business. The Wenatchee-Stratford Orchard Company got the use of every cent of that money.

Q. Was the money placed to the credit of the Wenatchee-Stratford Orchard Company?

A. It was.

Q. State whether or not it was checked out and

(Testimony of G. M. Brasfield.)

the money paid [51] for the use and benefit of the company.

A. It was, in the regular way, and my checks will show it all, as issued against that account.

Q. I call your attention to these various notes, being the same notes to which I have called the attention of the witness Hoffman, purporting to be issued before you became president, and ask you to state if they were just and valid obligations of the company and came into your hands in the usual course of business before you assigned those to Mr. Woolfolk.

The COURT.—Those were the notes read into the record to-day?

A. I think they are all right, so far as I know they are absolutely right.

Q. I ask you to look at the following notes, one for two thousand dollars, dated November 3, 1911, payable on demand, to your order, with interest at eight per cent, signed Wenatchee-Stratford Orchard Company by George M. Brasfield, president; a note for two thousand dollars dated November 10, 1911, payable on demand to your order, interest at eight per cent, signed Wenatchee-Stratford Orchard Company, by George M. Brasfield, president; the third note for \$1,682.47, payable on demand to your order, with interest at eight per cent, dated January 1, 1912, signed Wenatchee-Stratford Orchard Company by George M. Brasfield, president; fourth note for \$1,023.94, dated January 25, 1913, on demand, payable to your order, with interest at eight per cent, signed Wen-

(Testimony of G. M. Brasfield.)

atchee-Stratford Orchard Company, by George M. Brasfield, president; fifth, note for one thousand dollars, dated September 27, 1911, payable on demand, to your [52] order, with interest at eight per cent, signed Wenatchee-Stratford Orchard Company, by George M. Brasfield, president; sixth, note for one thousand dollars, dated October 10, 1911, payable on demand to your order with interest at eight per cent, signed Wenatchee-Stratford Orchard Company, by George M. Brasfield, president; and I will ask you to examine those notes and tell the Court whether or not those are just and valid obligations of the company, and what the consideration for those notes was.

A. These notes are all right, and I gave money for them to the amount stated in the notes.

Q. When you speak of giving money, what do you mean by that?

A. I mean I gave money to the company.

Q. Which was actually expended for the use and benefit of the company? A. Absolutely.

Q. And in good faith and the regular course of business? A. It was.

Q. I call your attention now to the last note, for nine thousand eight hundred and forty dollars, dated February 1, 1913, payable on demand to your order, with interest at eight per cent, signed Wenatchee-Stratford Orchard Company by George M. Brasfield, president, and ask you to look at that note and tell the Court what that represents.

A. That represents salary.

Q. From what date to what date?

(Testimony of G. M. Brasfield.)

A. From the time I became president of the company some time [53] in September, 1911, until the 1st of February, I believe, 1913.

Q. Is that the note referred to in the resolution shown on page 25 of the minute-book? A. It is.

Q. State to the Court whether or not after the meeting in the Realty Building, when you were voted a salary of one thousand dollars a month, you subsequently, after Mr. Hoffman complained of the amount of the salary, held a meeting with your wife, you and she as a majority of the trustees, and reduced the amount to \$9,840.00. A. We did.

Q. Mr. Hoffman had no notice of that meeting? It was simply called to reduce it in accordance with his wishes? A. Yes.

Q. Now, Mr. Brasfield, tell the Court as president of the company what you did, of what your duties consisted, what responsibilities you had; what money, if any, you caused to be procured for the benefit of the company, what condition you found the company when you took it, and just briefly a statement of the situation by which you earned the salary.

A. Well, it is a rather difficult matter to tell all of the things I did in connection with this matter during this period.

The COURT.—Give it in a general way.

Q. To begin with, the company was in a very bad condition when I was elected president. The trees had all died on the 400 acres of land planted, and the irrigation system was bad. We owed a great many

(Testimony of G. M. Brasfield.)

debts around in different places [54] and the company was generally in bad repute, almost ready to go into the hands of a receiver.

I attempted to bring the company about and put it on its feet. One of the first things I did was to put a fence around the property, a rabbit-proof fence, of about five miles, which I did. I employed a good orchardist, one of the best men in the country, and put him on the property. I had him level the land where it was high and where the water would not run. Instead of employing an expensive engineer *to that* work, I reorganized the irrigation system, which was totally inadequate, much of it had to be taken down and done away with.

Q. Why was that? A. It would not work.

Q. Had that been put in under your predecessors?

A. Yes. I began negotiations for pipe, lumber and stuff necessary to put in the irrigation, got the best bids we could; got good bids and bought the stuff at low prices, on long time. I knew we would have to get long time, because our money was scarce.

It was necessary to replant the whole 400 acres with trees. I got competitive bids on the price of trees; I got low prices, the best I could get, and accepted the lowest.

Then it was necessary to have money to carry this thing along and pay the bills, to pay off these suits they were threatening and some claims which had been put in the hands of attorneys, and to negotiate for funds and carry on the work, which I did, not only putting in my own money but made arrange-

(Testimony of G. M. Brasfield.)

ments with the [55] Scandinavian-American Bank to borrow fifteen thousand dollars, which they loaned us.

Q. Did you indorse the obligations?

A. I indorsed that myself personally. A good many land contracts had been sold to people. These people were up in arms and worried and troubled and all sorts of things going on. One of the things I did was to try to pacify those people and try to get them straightened out, and many of them I did; some few I did not, although I did everything I could. Most of them have gotten to going along all right.

In the spring we planted the whole four hundred acres of trees in good condition, cultivated them. I superintended the work and attended to the correspondence, a good deal of bookkeeping; got things straightened around generally.

I found the titles to our land and to our water bad. I supposed those things were good, but on looking into them found out they were not, and it has taken us a year to get those titles straightened.

Q. Tell the Court whether or not the matter of adjustment on these contracts took much time and work and diplomacy on your part.

A. It took a great deal of work; it was hard work, and mean work.

Q. Tell the Court whether or not there were lawsuits pending in Snohomish County or up in the Northern part of the State which required time and attention.

A. Yes. My idea was that when I got this thing

(Testimony of G. M. Brasfield.)

going and on its feet and the trees planted and the land in [56] cultivation and the irrigation system good and the contracts all quiet, I would be able to negotiate a loan on this property sufficient to pay off its debts and give us a working capital. I put in a great deal of time doing that. I got up prospectuses, blue-prints and all data with reference to apples and apple lands and everything of that sort. I took it up with loan men, bankers, financiers generally, and brokers, not only here and in Seattle, but in Portland, Chicago, New York, and everywhere I could think of, trying to negotiate a loan. I was not able to do it because of the condition of the apple business in the part season, and the evident depreciation in apple land, and simply was not able to do it. I tried to sell the raw lands, some of them; in fact, I tried to sell the whole proposition, wherever I could find any chance to sell it at all, but have not been able to do it. I did not try to sell any of the small tracts of orchards or contracts, because I did not think we were in condition to,—that is, there was a question about being able to carry out the contracts, and I did not want to make any more and have the same trouble and difficulty we had on the others.

It has been one of the most difficult and hardest and most vexing, worrying propositions I ever had anything to do with in my life, and I would not take the job again for one thousand dollars a month, and would not have it. I have not been able to think of anything else, it has been worry, fight and scrap all the way through.

(Testimony of G. M. Brasfield.)

Q. What portion of your time from September, 1911, until the bankruptcy proceedings here were consumed in the business [57] of the company?

A. I have done nothing else.

Q. You refer to the fact that you carried on the correspondence of the company; was that much or little? A. Considerable correspondence.

Q. What, if any, responsibility have you had with reference to the affairs of the company, and what, if any, assistance have you had from any other officer of the company in connection with it?

A. The responsibility has been great and I have had practically no support from anybody else.

Cross-examination.

(By Mr. SMITH.)

Q. Mr. Brasfield, these various notes to Mr. King you bought from him, did you? A. Yes, sir.

Q. Did you then sell those notes to Mr. Woolfolk?

A. I assigned the notes to Mr. Woolfolk as security.

Q. As security for what?

A. As security for the debt of the company on which I was endorser.

Q. And is the same true of the notes that the company made to you? A. It is.

Q. Was the assignment to the bank or Mr. Woolfolk personally? A. It was to the bank.

Q. When did you assign those and turn them over to the bank or Mr. Woolfolk?

A. I don't remember the exact date; sometime in February. [58]

(Testimony of G. M. Brasfield.)

Q. February of what year? A. 1913.

Q. You assigned these to the bank sometime in February, 1913, all of them? A. Yes.

Q. What had been the bank's security on those notes before that? A. My personal indorsement.

Q. Did you ever ask Mr. Prowell or Mr. Hoffman to indorse those notes?

A. Not those particular notes, but may I explain?

Q. You may explain that later.

Mr. HARVEY.—Go ahead now at this time and make any explanation in connection with your answer that you want to.

A. I had asked Mr. Prowell and Mr. Hoffman to indorse paper before, and they had refused to do it.

Q. What paper had you asked them to indorse before and they had refused?

A. I had asked them to indorse paper to raise the money to finance the institution.

Q. Give some specific instance.

A. I had not drawn up any paper; it was a talk or scheme or way by which I was in hopes of raising money.

Q. How long before that had you asked them to do this and they had refused?

A. Before which particular date do you have reference to?

Q. Before the time that you indorsed these notes of the Company given to the bank?

A. I had suggested a way of raising money at our September meeting in the year 1911. [59]

Q. State as nearly as you can remember what talk

(Testimony of G. M. Brasfield.)

you had with them at that time on this point.

A. My recollection is that the question of finances, which was a very live one at that time, came up, and ways and means of raising money was the question. So I suggested that we borrow the money from the bank and give the company's note, and all of us indorse the paper. They would not agree to that but said that they would put up their proportion of the money themselves. That was definitely understood and agreed to. When they declined to indorse the note, then it was agreed that each one should put up money in proportion to the amount of stock he had.

Q. But you did not catch my question. I asked you as nearly as you can state, what was said, not your conclusion or inferences—what was said between you and Mr. Hoffman and Mr. Prowell on this point?

A. I think that covers it; that is about as nearly as I can put it.

Q. I want you as nearly as you can remember to state what the conversation was between you and them; what you said and what they said?

A. Oh, I cannot attempt to remember all that.

Q. But state as nearly as you can remember what words were used; what conversation passed between you and them?

A. My recollection of their objection to that mode of procedure, that they had some,—

Mr. HARVEY.—I object to the question, in order to shorten the examination; it is entirely immaterial.

The COURT.—I think the witness has answered

(Testimony of G. M. Brasfield.)

as nearly as he can. [60]

Mr. SMITH.—I won't press the matter.

Q. You turned over this collateral, these notes to the bank and Mr. Woolfolk in February, 1913. State as nearly as you can what part of February it was.

A. It was,—I cannot remember the dates. I suppose it was along the 7th, 8th, 9th or 10th; in that neighborhood somewhere.

Q. What was the occasion of your turning these notes over to the bank?

A. The bank demanded further security for their loan.

Q. They demanded further security? A. Yes.

Q. Who was that—was that Mr. Woolfolk—did he conduct the matter?

A. He was the man I talked to.

Q. Did you and he agree that more notes of the Wenatchee-Stratford Orchard Company bearing only your personal indorsement and nothing else, would be further security? A. He did.

Q. You notice that these notes bear only one other indorsement and that is Dr. King's, and that is an indorsement without recourse? A. Yes.

Q. How long before Mr. Woolfolk began suit in the Superior Court of Pierce County on these notes did you turn over these King notes to him?

A. Mr. Woolfolk had not begun suit.

Q. How long before he began the suit was it that he turned these notes over?

A. I don't remember how long it was. [61]

Q. One day or one month or what, as nearly as you can state?

(Testimony of G. M. Brasfield.)

A. It was less than a month and more than one day. I suppose it was a couple of weeks,—something like that.

Q. That is as near as you can remember?

A. I am not clear on the date.

Q. Do you remember the incident of your confessing judgment—putting in a confession of judgment in that suit in the name of the Wenatchee-Stratford Orchard Company? A. I confessed judgment.

Q. How long before you confessed judgment had you turned these notes over to Mr. Woolfolk?

A. That was, how long had I confessed judgment?

Q. How long before that had you turned over the notes to Mr. Woolfolk?

A. That was two or three weeks, something like that. I don't remember the exact dates.

Q. The service of summons and complaint in that suit was made on you as president of the company, wasn't it?

Mr. HARVEY.—I object to that as not proper cross-examination.

The COURT.—Objection sustained.

Q. You say it was about February 7th, 8th, 9th or 10th you turned these notes over to the bank, and it was done because they demanded additional security, and after you turned over these notes, additional notes, to the bank, were they then satisfied?

Mr. HARVEY.—Objected to as immaterial and irrelevant.

The COURT.—He may answer.

(Question read.)

(Testimony of G. M. Brasfield.)

A. Well, they were better satisfied than they did before without any security, I presume. [62]

Q. How did you turn over this salary note at the same time you turned over the King notes to the bank? A. I think so.

Q. Had the company ever owed you more than they do at this time—in other words, has the company ever paid you back anything it owed you?

A. Nothing at all.

Q. Have you the check-book in which you wrote your checks? A. I have not it here.

Q. Will you bring it in with you after adjournment? A. I will.

Q. And the account-books of the company?

A. Mr. Harvey has them.

Mr. HARVEY.—I will bring them in.

Mr. SMITH.—Also bring in any cancelled vouchers or cancelled checks which you have; that is, anything you have, so that we may have it for quick reference.

Q. Mr. Harvey wove into a question something about your having reduced your salary to six hundred dollars a month to meet Mr. Hoffman's wishes and you acquiesced; do you mean to say that Mr. Hoffman was satisfied with six hundred dollars a month salary to you?

A. No, I do not mean to make that statement at all. Mr. Hoffman objected to any salary at all.

Q. Your advances then to the company, your own advances, were only some \$8,706.51, that being the notes which have been testified to as your advances?

(Testimony of G. M. Brasfield.)

A. You mean my total advances?

Q. To the company?

A. My total advances to the company? [63]

Q. Yes.

A. Whatever those notes say. I don't recall the amount.

Q. When you bought these notes from Dr. King, that was not an arrangement between you and the company, but between you and Dr. King? A. Yes.

Q. This fifteen thousand dollars borrowed from the bank, you borrowed for current needs of the company from time to time, paying debts of the company for equipment, supplies, labor and what not?

A. Yes.

Q. Now, you say that your work as president of the company took all of your working time between September, 1911, and the institution of the bankruptcy proceedings, substantially?

A. I devoted all of my time to this business.

Q. How much of the time were you over at Stratford?

A. During the spring and summer I was over there a great deal of the time. I could not state the exact number of days I was there, but during the busy season, and when I was needed there I was there; sometimes two days at a time and sometimes a week, and sometimes two weeks at a time.

Q. Now, you had this expert orchardist whom you say is one of the best in the country? He was perfectly competent to do the work, to attend to the cul-

(Testimony of G. M. Brasfield.)

tivating and development of the properties, wasn't he?

A. He was perfectly competent to do the work, but he was not competent as a business man by any manner of means.

Q. He conducted all the practical work of improving and developing the properties, however? [64]

A. Under my supervision.

Q. Are you an irrigation man?

A. I am somewhat of one now. I was not in the beginning. I have learned a great deal about irrigation.

Q. When you started in you did not know anything about it? A. No, but I have been a close student.

Q. Now, your business experience has been mostly in lumber, hasn't it?

A. Yes, and I might add that I would have been in that now if I had not got into this.

Q. How many contracts did you settle?

A. How many contracts?

Q. Yes.

A. Well, I think there were 25 contracts, all told.

Q. That you settled?

A. Oh, no; there were ten I did not settle, and of the balance I have settled some of them and pacified the others. The fact is, I think I have settled all the balance.

Q. Some fifteen, then, you think you settled?

A. Yes. Well, I recollect one that there has been no controversy over.

Q. I suppose Mr. Dudley, your foreman, put

(Testimony of G. M. Brasfield.)

around the rabbit-proof fence?

A. Well, I hired the men and saw to the work, and I—

The COURT.—I assume this witness only had the general management.

Redirect Examination.

(By Mr. HARVEY.)

Q. Counsel in his cross-examination has referred to these [65] notes which we will specify as the King notes, that is running to Mr. King and signed by the company and purchased by you, and he has asked you if that was an arrangement between you and Dr. King. Please state whether or not what you were doing was to carry along the past-due obligations of the Wenatchee-Stratford Orchard Company; were these the obligations of the company outstanding, past due, which you were carrying?

A. Yes, they were.

Recross-examination.

(By Mr. SMITH.)

Q. You bought these notes from Dr. King about the same time you bought his stock, didn't you?

A. Oh, I bought the notes and stock at the same time.

Q. It was one transaction between you and him?

A. Yes.

(By Mr. HARVEY.)

Q. These notes are the obligations covered by this judgment which Mr. Smith asked you about?

A. Yes, they are.

(Witness excused.)

Mr. HARVEY.—I will furnish copies of the notes we have referred to, for the record.

Mr. SMITH.—That will be satisfactory.

Mr. HARVEY.—And I want also to supply the record with a certified copy of the judgment of the Superior Court of Pierce County, copy of which I have attached to my proof of claim. [66]

Mr. SMITH.—I do not care to have it certified, but would like also copies of the findings and conclusions.

Mr. HARVEY.—I will furnish copy of the findings and conclusions and will furnish a certified copy of the judgment.

Mr. SMITH.—Very well.

The COURT.—That will be understood.

(Argument by counsel.)

Whereupon an adjournment was taken until 1:30 P. M. [67]

Mr. SMITH.—I would also like to have the record show that I have leave to put my objections into compact written shape.

The COURT.—That may be understood.

Mr. HARVEY.—Of course the objections should not be any different than they have been here.

Mr. SMITH.—Oh, not at all, but with counsel's permission, I will omit entirely the objection I made, which I am inclined to think now was not well established, that is, the objection as to failing to vacate the judgment.

[Indorsed]: Filed U. S. District Court, Western District of Washington. April 16, 1913. Frank L. Crosby, Clerk. E. C. Ellington, Deputy. [68]

Petition [to Referee in Bankruptcy] for Review.

To the Honorable R. F. Laffoon, Esq., Referee in Bankruptcy:

Your petitioner F. W. Hoffman respectfully shows as follows:

I.

That he is a creditor of the above-named bankrupt; that his claim has been duly and regularly filed with and approved by the Referee in Bankruptcy herein; that he is one of the officers of and a stockholder in the above-named bankrupt corporation.

II.

That heretofore the above-named corporation was adjudicated a bankrupt and on the 21st day of March, 1913, the first meeting of the creditors was held for the purpose of filing and approving claims of creditors and for the purpose of electing a trustee. That at such time one L. H. Woolfolk of Seattle, Washington, submitted a claim to the above-named Referee for approval and filed the same in said matter; that said claim was in the amount of Forty-six Thousand One Hundred Forty-seven and 84/100 (\$46,147.84) Dollars and was based upon a certain judgment entered in the Superior Court of Pierce County, Washington, prior to said date.

III.

That your petitioner objected to the filing and approval of said claim and stated said objections to the referee in bankruptcy orally and agreed thereafter to file a written statement thereof. Said objections were based upon the following grounds, to wit: [69]

I.

That it appeared that said claim was based upon a judgment in the Superior Court, Pierce County, Washington, and that it did not appear affirmatively that there was no real estate in said county on which said judgment would be a lien or that a transcript of said judgment had not been filed in other counties within the State in which there was real estate upon which said judgment would be a lien. That it did not appear that the claimant was not a secured creditor.

II.

That it appeared from the evidence submitted that some \$25,000.00 of said claim was not a valid or just claim against the above-named bankrupt; that said debt of \$25,000.00 was represented by certain promissory notes, executed by George M. Brasfield as President of said bankrupt corporation, payable to said George M. Brasfield individually, without any showing that said George M. Brasfield was authorized to so execute said notes or that there was any sufficient consideration or consideration at all therefor.

III.

That the evidence showed that between nine and ten thousand dollars of said alleged debt was a claim for salary to said George M. Brasfield for services rendered as President of said bankrupt corporation. That it further appeared that said alleged allowance of salary was not voted at a meeting of the trustees of said corporation duly and regularly held; that notice of said meeting, if any at all were held, was

not given to all the board of trustees; that said salary was alleged to be voted for past services rendered by said George M. Brasfield to said bankrupt corporation, but it affirmatively appeared that there was no contract by said corporation to pay for said services, and that there was no understanding or agreement that said George M. [70] Brasfield should be compensated therefor.

IV.

That it appeared that certain other of said notes so alleged to be executed by said bankrupt corporation to said George M. Brasfield were without any adequate consideration and were not duly authorized and in fact executed by said corporation.

V.

That the evidence established that said judgment upon which the whole of said claim was based was confessed by said George M. Brasfield purporting to act as the President and duly authorized agent of the above-named bankrupt corporation; that said George M. Brasfield was not authorized by said corporation to so confess judgment and acted entirely without authority or directions from said corporation and without the knowledge or concurrence of the stockholders of said corporation and its officers.

VI.

That it appeared that said judgment was based in part upon notes purporting to be issued by the above-named bankrupt corporation to said George M. Brasfield individually and purporting to have been assigned by said George M. Brasfield to the said L. H. Woolfolk, judgment creditor in said action, as col-

lateral security for the payment of certain other notes held by said L. H. Woolfolk executed by the above-named bankrupt and indorsed by said George M. Brasfield. That, as a matter of fact, the evidence clearly established that said notes were assigned to said L. H. Woolfolk by said George M. Brasfield for the purpose of collection and that said L. H. Woolfolk held said notes as trustee for said George M. Brasfield for the purpose of collecting them and that said George M. Brasfield in confessing judgment upon said notes in favor of said L. H. Woolfolk in virtue and effect confessed judgment in his own favor upon said notes against the [71] above-named bankrupt. That said judgment was fraudulent and collusive and was not a valid and existing debt of the above-named bankrupt.

VII.

On these several grounds, this petitioner objected to the filing and approval of said claim of L. H. Woolfolk and objected to the voting of said L. H. Woolfolk as a creditor of the above-named bankrupt upon said claim.

IV.

That over this petitioner's objections duly made and filed an order was entered in the above-entitled matter on the 24th day of March, 1913, approving said claim and permitting same to be filed and that at the time of said meeting of creditors, the said L. H. Woolfolk was permitted to vote upon said claim on all measures before said meeting and especially in the election of a trustee.

V.

It is the position of this petitioner that the Referee above named erred in not finding that said judgment upon which the claim of said L. H. Woolfolk was based was collusive and fraudulent; and in not finding that said claim was in part based upon promissory notes executed without authority and without any sufficient consideration therefor; and in not sustaining the objections of this petitioner established by the evidence adduced at said hearing and in permitting said claim to be filed and approved, and the said L. H. Woolfolk to vote as a creditor by virtue of said claim.

That said Referee erred in giving any virtue, effect or consideration to the vote of said L. H. Woolfolk so based upon said invalid claim. [72]

Wherefore, this petitioner respectfully prays that the usual record of the proceedings had pursuant to the filing and approval of said claim and the objections thereto, including said claim and the evidences in support thereof and all its exhibits, together with the objections thereto and the transcript of the testimony taken down and used in connection therewith, and the final order entered thereon on the 24th day of March, 1913, be certified for review to the District Court of the United States for the Western District of Washington, Southern Division.

WINFIELD R. SMITH,
Attorney for Petitioner. [73]

United States of America,
State of Washington,—ss.

I, Winfield R. Smith, attorney for the petitioner

mentioned and described in the foregoing petition, do make solemn oath and state that the foregoing petition is true according to the best knowledge, information and belief of affiant, and further certify that I believe that the petition is, in my opinion, well founded in point of law and that it is not interposed for delay.

WINFIELD R. SMITH.

Subscribed and sworn to before me this 29th day of March, A. D. 1913.

[Seal]

ROY W. McREYNOLDS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of the within paper is hereby rec'd this 31st day of March, 1913.

WALTER M. HARVEY,

Attorney for Trustee.

[Endorsed]: Petition for Review. Filed this 31st day of Mch., 1913. 3 P. M. R. F. Laffoon, Referee in Bankruptcy. [74]

Referee's Certificate on Review.

To the Honorable EDWARD E. CUSHMAN, U. S.
District Judge.

I, R. F. Laffoon, the Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceeding, and on the 21st day of March, 1913, at the first meeting of creditors herein, that certain creditor, L. H. Woolfolk, offered for filing his certain proof of claim in regular form for proofs of claims resting in judg-

ment, and specially waiving any claim of lien, preference or priority, by reason of said judgment, and said claim being in the sum and amount of \$46,138.84. That to said offer, and in opposition thereto, that certain creditor, F. W. Hoffman, by his attorney, Winfield R. Smith, Esq., interposed certain exceptions found at pages 4, 5 and 6 of the transcript of testimony taken at the hearing had upon such exceptions at said time. The gist of said exceptions being that the judgment upon which the claim of said Woolfolk was based, was a judgment by confession and that such confession was collusive, without authority, and prejudicial to the rights of other creditors and stockholders, and that the promissory notes upon which said judgment was based, were without consideration. That upon this view of the case, the Referee went into an examination of the claim presented, and heard the testimony offered by the objecting creditor, and that produced by the claimant, L. H. Woolfolk, in support of his claim.

It appeared from such examination that Mr. G. M. Brasfield became president and treasurer of the bankrupt corporation on about the 18th of September, 1911; that his wife, Virgie Brasfield, was a director in the company, as well as himself, and that the third director was the objector, F. W. Hoffman, who was during all this time the secretary; that the [75] board consisted of the three, G. M. Brasfield, Virgie Brasfield and F. W. Hoffman; that F. W. Hoffman, the secretary, resided at Wenatchee, and G. M. Brasfield and his wife, Virgie, resided at Tacoma; that G. M. Brasfield, as the president, was

empowered by the by-laws, to manage the whole affairs of the corporation, and that he actually did exercise complete control over the business affairs of the corporation during his incumbency as president and treasurer up to the date of the adjudication. See testimony of Hoffman, record, pages 10, 11 and 12; that the bankrupt, by Brasfield's predecessor, issued notes of the company to the extent of about \$7,590.00 at 8% interest, some to himself, and some to Brasfield, and that Brasfield bought from his predecessor the notes issued to himself known as the King notes, six certain notes. That Brasfield, during his incumbency had issued to himself, for money furnished by him for the bankrupt, notes in the sum of \$8,706.51. That he also during his incumbency, negotiated three loans from the Scandinavian-American Bank of Seattle, in the total amount of \$15,000.00, and suffered an overdraft of \$75.77, and issued the notes of the bankrupt company to the said bank, in that amount; that in his negotiations with the said bank in the obtaining of said loans, he personally indorsed the notes of company given to the bank for the loan, and indorsed to the bank as collateral to said loan, the notes of the bankrupt bought from King, his predecessor, the notes issued to him by the company through King, his predecessor, and the notes issued to him for money furnished the company by himself, all of which notes, including the notes given to the bank, were ratified by the full board of directors at a formal meeting of the board held in Tacoma, on January, 30, 1913; that at [76] said meeting on January 30, 1913, the board author-

ized a salary to the president of \$1,000.00 per month, from the date of his election, by a vote of two of the Trustees, Brasfield himself, and his wife, director Hoffman voting in the negative. Afterwards at a special meeting held at Tacoma, and no one present except Brasfield and his wife, a resolution was passed reducing the allowance of salary at \$1,000.00 per month during the time, and entering a resolution authorizing a salary of \$9,840.00 for the whole time. Record page 19. At the last stockholders' meeting held about the 18th of December, 1911, at which time Brasfield became president, a resolution was adopted by the stockholders, providing that no officer of the company should have a salary, except the president; that the president should receive a compensation of \$—— per annum, payable per —— . See record pages 26 and 27. Upon passing of the resolution authorizing \$9,840.00 salary to the president, Brasfield as president issued notes to himself for the same, and indorsed the said notes to the Scandinavian-American Bank, or the claimant, L. H. Woolfolk, as additional collateral to the aforesaid loans.

It was conceded that in the judgment complained of, L. H. Woolfolk was the assignee of the Scandinavian-American Bank, and the holder of all of the aforesaid notes. It was also conceded that said G. M. Brasfield was the owner of 69% of the capital stock of the bankrupt corporation. It was contended that there was collusion between L. H. Woolfolk and said Brasfield in the institution of said suit, and the confession of said judgment, but there

was nothing in the testimony, nor in the conditions surrounding the transaction, to [77] indicate to the Referee that any such collusion existed. The transaction with the bank seems to be against the interests of the said Brasfield. While the judgment confessed exceeds \$46,000.00, and the loan from the bank was slightly more than \$15,000.00, it would appear that the bank would become the trustee of the said Brasfield for any collections it would make over and above its \$15,000.00, yet the bankrupt estate would have to pay a dividend of about 40% before the bank would have recovered its \$15,000.00, so that Brasfield would obtain nothing from the bank by reason of said negotiations until after the bank has been fully paid out of all of the proceeds of the notes it holds, and if the estate should not pay more than 40%, Brasfield may never get anything, while all other creditors would get a dividend of 40%, if so much were paid, on all other claims, so it is hard for the Referee to see wherein Mr. Brasfield would gain in such an alleged conspiracy.

It was not contended that the president of the corporation had no power to confess judgment, but merely that Brasfield was not authorized by the company, so to confess, and that the confession was collusive; finding no basis for the charge of collusion, the Referee overruled the exceptions in that behalf.

On the other phase of the case, that the note for salary was unauthorized and void, the Referee was of the opinion that the records of the company were sufficient in themselves to warrant the board of directors in providing a salary for the president, either

for salary earned or to be earned, when it was contemplated by the stockholders that the president should have a salary, although the stockholders had not fixed it. It was conceded in the argument, that while [78] these notes for salary were unauthorized, the president would likely be able to recover for his services in an action on a *quantum meruit*. Under such circumstances, the board of directors have power to fix compensation for any servant, or officer, that is entitled to compensation under the by-laws of the company, and with that view of the matter the referee overruled the exceptions in that regard, and allowed the proof of claim to be filed as offered; and, thereafter, an election was held wherein George B. Burke, was elected trustee, said claim participating therein; and on March 24, 1913, an order was entered herein confirming said election.

The said F. W. Hoffman feeling himself aggrieved at such ruling and order, filed his petition for review on March 31, which petition was granted.

As appears to the referee, the question presented here for review is, whether the referee should have disallowed and rejected the claim of L. H. Woolfolk, as based upon the judgment of the Superior Court, and allowed the claim as proved before him, or, should he have allowed and filed the proof of claim offered, as he did.

I hand up for the information of the Judge, the following papers:

1. The record-book of this proceeding.
2. The petition on which this certificate is granted.

3. Transcript of the stenographer's notes of the proceeding.

4. All other papers filed with me herein which are pertinent to this review.

Dated Tacoma, Washington, April 15, 1913.

Respectfully submitted,

R. F. LAFFOON,

Referee in Bankruptcy. [79]

[Endorsed]: Referee's Certificate on Review.
Filed this 16th day of April, 1913. 2 P. M. R. F.
Laffoon, Referee in Bankruptcy. [80]

[Opinion.]

WINFIELD R. SMITH, for Petitioning Creditors
Hoffman & Prowell.

WALTER M. HARVEY, for Respondent Creditors
and Trustee.

CUSHMAN, District Judge.

This matter is before the Court upon a petition of certain creditors to review the decision of the referee, allowing a claim on confession of judgment and allowing the same to be voted upon the selection of a trustee. It is also before the Court upon the motion of such creditors to transfer the proceedings from the Southern to the Northern Division of the District, upon the ground that its principal place of business is in the Northern Division.

The referee certifies:

“The gist of said exceptions being that the judgment upon which the claim of said Woolfolk was based, was a judgment by confession and that such

confession was collusive, without authority, and prejudicial to the rights of other creditors and stockholders, and that the promissory notes upon which said judgment was based, were without consideration. That upon this view of the case, the referee went into an examination of the claim presented, and heard the testimony offered by the objecting creditor, and that produced by the claimant, L. F. Woolfolk, in support of his claim.

“It appeared from such examination that Mr. G. M. Brasfield became the president and treasurer of the bankrupt corporation on about the 18th day of September, 1911; that his wife, Virgie Brasfield, was a director in the company, as well as himself, and that the third director was the objector, F. W. Hoffman, who was during all this time the secretary; that the board consisted of the three, G. M. Brasfield, Virgie Brasfield and F. W. Hoffman; that F. W. Hoffman, the secretary, resided at Wenatchee; and G. M. Brasfield and his wife, Virgie, resided at Tacoma; that G. M. Brasfield, as the president, was empowered by the by-laws, to manage the whole affairs of the corporation, and that he actually did exercise complete control over the business affairs of the corporation during his incumbency as president and treasurer up to the date of the adjudication. See testimony of Hoffman, record, pages 10, 11 and 12; that the bankrupt, by Brasfield’s predecessor, issued notes of the company to the extent of about \$7590.00 at 8% interest, some to himself, and some to Brasfield, and that Brasfield bought from his predecessor the notes issued to himself known as the

King notes, six certain notes. That Brasfield, during his incumbency had issued to himself, for money furnished by him for the bankrupt, notes in the sum of \$8760.51. That he also [81] during his incumbency, negotiated three loans from the Scandinavian-American Bank of Seattle, in the total amount of \$15,000.00, and suffered an overdraft of \$75.77, and issued the notes of the bankrupt company to the said bank, in that amount; that in his negotiations with the said bank in the obtaining of said loans, he personally endorsed the notes of company given to the bank for the loan, and endorsed to the bank as collateral to said loan, the notes of the bankrupt bought from King, his predecessor, the notes issued to him by the company through King, his predecessor and the notes issued to him for money furnished the company by himself, all of which notes, including the notes given to the bank, were ratified by the full board of directors at a formal meeting of the board held in Tacoma, on January 30, 1913; that at said meeting on January 30, 1913, the board authorized a salary to the president of \$1000.00 per month, from the date of his election, by a vote of two of the trustees, Brasfield, himself, and his wife, director Hoffman voting in the negative. Afterwards at a special meeting held at Tacoma, and no one present except Brasfield and his wife, a resolution was passed reducing the allowance of salary at \$1000.00 per month during the time, and entering a resolution authorizing a salary of \$9840.00 for the whole time. Record page 19. At the last stockholders meeting held about the 18th of December,

1911, at which time Brasfield became president, a resolution was adopted by the stockholders, providing that no officer of the company should have a salary, except the president; that the president should receive a compensation of \$——, per annum, payable per —— . See record pages 26 and 27. Upon passing of the resolution authorizing \$9840, salary to the president, Brasfield as president issued notes to himself for the same, and endorsed the said notes to the Scandinavian-American Bank, or the claimant, L. W. Woolfolk, as additional collateral to the aforesaid loans.

“It was conceded that in the judgment complained of, L. H. Woolfolk was the assignee of the Scandinavian-American Bank, and the holder of all of the aforesaid notes. It was also conceded that said G. M. Brasfield was the owner of 69% of the capital stock of the bankrupt corporation. It was contended that there was collusion between L. H. Woolfolk and said Brasfield in the institution of said suit, and the confession of said judgment, but there was nothing in the testimony, nor in the conditions surrounding the transaction, to indicate to the referee that any such collusion existed. The transaction with the bank seems to be against the interests of the said Brasfield. While the judgment confessed exceeds \$46,000.00, and the loan from the bank was slightly more than \$15,000.00, it would appear that the bank would become the trustee of the said Brasfield for any collection it would make over and above its \$15,000.00, yet, the bankrupt estate would have to pay a dividend of about 40% before the bank

would have recovered its \$15,000.00, so that Brasfield would obtain nothing from the bank by reason of said negotiations until after the bank has been fully paid out of all of the proceeds of the notes it holds, and if the estate should not pay more than 40%, Brasfield may never get anything, while all other creditors would get a dividend of 40%, if so much were paid, on all other claims, so it is hard for the referee to see wherein Mr. Brasfield would gain in such an alleged conspiracy." [82]

The following authorities are cited by the petitioning creditors on the petition for review:

Adams vs. The Crosswood Printing Co., 27 Ill.

App. 313;

Hoyt vs. Thompson, 5 N. Y. 321;

Joliet Elec. L. & P. Co. vs. Ingalls, 23 Ill. App. 45;

Stokes vs. New Jersey Pottery Co., 46 N. J. L. 237;

Arizona Min. Co. vs. Benton, 100 Pac. 952;

Doe vs. N. W. Coal & Trans. Co., 78 Fed. 62, at 66;

National L. & I. Co. vs. Rockland Co., 94 Fed. 335;

Dial vs. Company, 52 Wash. 81, 85-6;

Home & Co. vs. Tillman, 53 S. E. (Ga.) 1019, 1022;

Kahoe vs. Ry. Co., 60 S. E. (N. C.) 640;

Utica &c Co. vs. Waggoner &c. Co., 132 N. W. (Mich.) 502;

O'Brien Boiler Works Co., 135 S. W. (Mo.) 347;

- Brophy vs. American Brew. Co., 61 Atl. (Pa.) 123;
- Graffner vs. Ry. Co., 56 Atl. (Pa.) 426.
- Doernbecker vs. Columbia City Lbr. Co., 28 Pac. (Ore.) 899, 900;
- Vaught vs. Ohio County Fair Co., 49 S. W. (Ky.) 426-427;
- Singer vs. Salt Lake City Copper Mfg. Co., 53 Pac. (Utah) 1024, 1028;
- Hatch vs. Lucky Bill Min. Co., 71 Pac. (Utah) 865;
- Broughton vs. Jones, 79 N. W. (Mich.) 691;
- Bank of National City vs. Johnston, 65 Pac. 383;
- Holcome vs. Trenton White City Company, 82 Atl. 618;
- Hill vs. Rich Hill Coal Min. Co., 24 S. W. 223; [83]
- Jacobson vs. Brooklyn Lbr. Co., 76 N. E. (N. Y.) 1075;
- 10 Am. & Eng. Enc. of Law, 790;
- Steel vs. Golfissure Gold Min. Co., 95 Pac. (Colo.) 349; 351;
- McNulta vs. Corn Belt Bank, 45 N. E. (Ill.) 954;
- Camden Land Co. vs. Lewis, 63 Atl. (Me.) 523;
- McConnell vs. Combination M. & M. Co., 76 Pac. 194;
- Adams vs. Burke, 102 Ill. App. 148;
- Ritchie vs. People's Tel. Co., 119 N. W. (S. Dak.) 990;
- State vs. Manhattan Rubber Co., 50 S. W. (Mo.) 321, 325;
- Monmouth Inv. Co. vs. Means, 151 Fed. 159;

Ravenswood S. & G. Ry. Co. vs. Woodyard, 33 S. E. (W. Va.) 285;

Dauids vs. Davids, 120 N. Y. Sup. 350.

The following authorities are cited by the respondent creditors on petition for review:

Gilman vs. Heitman, 113 N. W. 932;

McDonald vs. Chisholme, 132 Ill. 273;

Chamberlain vs. Mammoth Min. Co., 20 Mo. 96;

Ford vs. Hill, 92 Wis. 188; 53 Am. St. Rpts., 902; 66 N. W. 115;

Clark & Marshall on Corporations, p. 2141;

Miller vs. Oregon City Mfg. Co., 3 Ore. 24;

Miller Bros. vs. Bank of British Columbia, 2 Ore. 291;

Irvine vs. Randolph Lbr. Corporation, 69 S. E. 350;

White vs. Crow, 17 Fed. 98; aff'd 110 U. S. 183;
[84]

Van Fleet on Collateral Attack, Section 17;

Robinett vs. Michaux, 101 Va. 762; 45 S. E. 287;
99 Am. St. R. 928;

Nat'l Loan & Ins. Co. vs. Rockland Co., 94 Fed. 335.

The following authorities are cited by the moving creditors on the motion to transfer:

Rossie Iron Works vs. Westbrook, 13 N. Y. Sup. 141;

Elmira Steel Co., 109 Fed. 456;

Loveland on Bankruptcy, 4 Ed., 117;

The respondent creditors cite the following authorities on the motion to transfer:

Collier on Bankruptcy, pp. 26 and 27;

Dressel vs. North State Lbr. Co., 107 Fed. 255;
Tiffany vs. La Plume Condensed Milk Co., 141
Fed. 444;

In re Pennsylvania Consolidated Coal Co., 163
Fed. 579;

In re Magid-Hope Silk Mfg. Co., 110 Fed. 352;

In re Machine and Conveyor Co., 91 Fed. 630.

Upon the hearing it was admitted that all of the money for which judgment was confessed was actually owing by the corporation, except a note for nine thousand eight hundred forty dollars, on account of back salary of Brasfield as President.

As proceedings in bankruptcy are administered according to principles of equity, Mr. Woolfolk, either as judgment creditor or as holder of between thirty and thirty-five thousand dollars of the uncontested notes, had a right to vote [85] for the trustee. With this undisputed amount voted, there was a majority of the creditors, in number and amount, voting for the trustee. Under such circumstances, it would be inequitable to treat the judgment as an entirety and disallow it *in toto*, if any part of the recovery allowed therein should be found unwarranted.

The Washington statute provides:

“When the action is against the state, a county or other public corporation therein, or a private corporation or minor, the confession should be made by the person who, at the time, sustains the relation to such state, corporation, county or minor, as would authorize the service of a notice (summons) upon him” 1 Rem. & Bal. Code, Sec. 414.

It is, therefore, clear that Brasfield, as president of the corporation had authority to confess judgment generally, as he was an officer upon whom service of summons could be had. 1 Rem. & Bal., Sec. 226 (8).

The salary note was a demand note and, under the circumstances in which it was given by the corporation, through its president, to himself, it is clear that it was due immediately and that the bank and the judgment creditor, Woolfolk, took it after maturity. 7 Cyc. 849, (2).

The question of good faith between the creditor, Woolfolk, and the president of the corporation in confessing judgment; the authority of the president of the corporation and his wife—being two of the three directors—to fix the amount of and vote him back salary without the consent, in the absence of and without notice to the other director, were, without objection, submitted to the referee, considered and determined by him.

There appears to be authority for this course:

“(2) IMPEACHING JUDGMENTS. Here the English doctrine is [86] much broader than our own. Full faith and credit being necessarily given to the judgments of the State Courts when pleaded in the Federal Courts, it was, under the former law, held that a judgment of a State court could not be impeached when presented as a claim in bankruptcy, but resort must be had to the State court. That it is conclusive between the bankrupt and the judgment creditor is elementary. But where the rights of general creditors have intervened, the English rule that such a judgment is but *prima facie* evi-

dence of a provable debt is fairer. The law in the United States seems, however, to be that the trustee of a creditor may attack it in the bankruptcy proceeding for fraud or collusion, but not otherwise. A judgment not regular on its face, or by a Court which did not have jurisdiction of the subject-matter, may of course be attacked anywhere; but jurisdiction need not affirmatively appear, nor can the recitals of the judgment, as a rule, be contradicted in a collateral proceeding." Collier on Bankruptcy, 9th ed., p. 861.

"VALIDITY—a In General. A judgment entered upon the confession of defendant may be impeached for fraud by other creditors whose rights or remedies are affected by it, although, if no fraud or deception was practiced on the debtor, it is binding as between the original parties. As to the proceedings in entering or confessing the judgment, although there are some decisions to the effect that a judgment which does not conform to the requirements of the statute is absolutely void, the better rule appears to be that if there has been an attempt to comply in all respects with the law, the judgment is at most only voidable at the instance of creditors, although the execution of such attempt be informal, or defective; but the total omission of any of the steps prescribed by the statute will render the judgment entirely inoperative and void. Where the statute provides that there shall be filed with a confession of judgment a statement of the facts out of which the indebtedness arose, it has been held that the filing of a defective or insufficient statement will not render the judgment

void as between the parties; as against other creditors it raises a presumption of fraud, and they may attack it on this ground; but plaintiff may sustain his judgment by proving that it is fair, and not fraudulent or collusive, and warranted by the facts actually existing although such facts were not included in the statement." 23 Cyc., pp. 720 & 721.

This being the state of the record, the same course will be followed and the salary note considered on its merits, without going into the questions of collateral attack and the faith and credit to be accorded the judgment of the State Courts generally.

It is concluded there is no authority in an agent, such as the director and president of a corporation, to thus deal with himself, to his own advantage and to the corresponding detriment of others whom he represents. That the salary [87] transaction was presumably fraudulent. If such an officer can, under the circumstances, recover at all, it is upon the *quantum meruit*, and not upon his contract with himself. 10 Cyc., pp. 789 et seq.

The amended Articles of Incorporation fixed the principal place of business of the corporation at Seattle, in the Northern Division of this District. It is contended that this fact is conclusive upon this question and, under Section 53 of the Judicial Code and subdivision 1, section 2 of the Bankruptcy Act, giving courts of bankruptcy jurisdiction,

"to adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof,"

the proceedings will only lie in the Northern Division of this District and that the cause should be transferred thereto.

It appears indisputably that, as a matter of fact, all of the business of the bankrupt was transacted from its offices at Tacoma, in the Southern Division for the six months preceding the filing of the petition to be adjudged a bankrupt. The fact, rather than the declaration in its articles, is controlling.

Collier on Bankruptcy, 9th Ed., p. 33 (Sec. 2);
Dressel vs. North State Lbr. Co., 107 Fed. 255;
In re Pennsylvania Consol. Coal Co., 163 Fed.
579.

The referee will proceed in accordance with this decision.

[Endorsed]: Decision on Petition for Review and Motion to Transfer. Filed in the U. S. District Court, Western Dist. of Washington, May 15, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [88]

Order [Ratifying, Approving and Confirming Certain Rulings and Decisions of Referee in Bankruptcy, etc.].

This cause having heretofore come on regularly for hearing upon the petition of F. W. Hoffman and W. R. Prowell, creditors of said bankrupt, to review the decision of the referee allowing the claim of L. H. Woolfolk, based upon a judgment by confession entered by the Superior Court of the State of Washington for Pierce County, and allowing the said L. H.

Woolfolk, as such judgment creditor, to vote upon the selection of a trustee, and it appearing to the Court that said judgment by confession was duly and regularly entered upon a statement confessing judgment signed by the president of said bankrupt corporation, who was duly authorized to execute and file the same, and that all of the promissory notes which formed the various causes of action which were reduced to judgment in said cause were valid, subsisting and legal obligations of said bankrupt corporation, for which said bankrupt received full value, save and except a certain note for \$9,840.00, which was a note executed to the president of said bankrupt corporation, George M. Brasfield for salary, which said salary note is not a just and valid claim against said bankrupt corporation, but that the president of said corporation upon a *quantum meruit* and not upon a contract made with himself, the said creditors F. W. Hoffman and W. R. Prowell appearing by their attorney, Winfield R. Smith, Esq., and the other creditors and trustee in bankruptcy appearing by their attorney, Walter M. Harvey, the Court having heard the argument of counsel and being fully advised in the premises and having taken said petition for review under advisement and having heretofore, to wit, on the 15th day of May, 1913, filed a written decision herein. [89]

Now, THEREFORE, it is hereby ordered that all of the rulings and decisions of the referee in bankruptcy in this cause (except as hereinafter provided) referred to in said petition for review and the action of the creditors in the selection of George B. Burke

as trustee, and the action of the referee in approving said selection and in allowing the said L. H. Woolfolk as a creditor to vote at said election, be and the same are hereby ratified, approved and confirmed.

IT IS HEREBY FURTHER ORDERED, that said referee in bankruptcy be and he is hereby directed in the allowance and consideration of claims against said estate to reduce said judgment by the amount of \$9840.00, and interest thereon amounting to \$13.12, and that George M. Brasfield, the president of said bankrupt corporation, and L. H. Woolfolk, as his assignee, be and they are hereby permitted to take such further steps and proceedings as they may deem proper to recover the amount of salary, if any, to which the said George M. Brasfield, as president of said corporation, may be entitled to, and this order and adjudication shall be without prejudice to the rights of said George M. Brasfield and L. H. Woolfolk, as his assignee, in connection with the claims for such salary; to which ruling the said creditors Hoffman and Prowell duly excepted and their exceptions were allowed.

Done in open court this 28th day of May, 1913.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed U. S. District Court Western District of Washington. May 29, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy. [90]

Order Permitting Appeal in Name of Trustee.

Upon the petition of F. W. Hoffman and W. R. Prowell, creditors of the above-named bankrupt, to

appeal in the name of George B. Burke, trustee in bankruptcy of said bankrupt, to the Circuit Court of Appeals for the Ninth Circuit, from an order entered by the above-entitled court on the 29th day of May, 1913, approving in part the allowance of the claim of L. H. Woolfolk, it appearing to the Court that the appeal should be allowed and that the trustee has refused to prosecute the same.

The petition of said creditors is hereby granted to conduct the appeal in the name of George B. Burke, trustee, at petitioner's cost in case of affirmance.

Done in open court this 7th day of June, 1913.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Order Permitting Appeal in Name of Trustee. Filed U. S. District Court, Western District of Washington. Jun. 7, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy. [91]

Petition for Appeal.

George B. Burke, trustee in bankruptcy of the Wenatchee-Stratford Orchard Company, considering himself aggrieved by the order made and entered on the 29th day of May, 1913, in the above-entitled cause by the above-entitled court approving in part the allowance of the claims of L. H. Woolfolk, does hereby appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that the transcript of the record,

proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WINFIELD R. SMITH,
Attorney for Trustee for the Purpose of This Appeal.

The foregoing claim of appeal is hereby allowed and the bond to be given therein fixed in the amount of \$1,000.00 this 7th day of June, 1913.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Petition for Appeal. Filed U. S. District Court, Western District of Washington. Jun. 7, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy. [92]

Assignments of Error.

On this 7th day of June, 1913, come now F. W. Hoffman and W. R. Prowell, creditors, in the name and as the act of George B. Burke, the trustee in bankruptcy of the Wenatchee-Stratford Orchard Company, by Winfield R. Smith, attorney for the said trustee, for the purposes of this appeal, and say that the order entered in the above-entitled court in this cause on the 29th day of May, 1913, approving in part allowance by the referee of the claim of L. H. Woolfolk, is erroneous and against the rights of the remaining creditors represented by the said trustee, for the following reasons:

I.

The ruling that G. M. Brasfield, as president of

the said bankrupt corporation, was empowered to confess judgment in its behalf, is erroneous.

II.

The Court erred in failing to hold that Brasfield, individually, was the beneficial owner of the major part of the notes upon which said judgment was confessed, and in failing to hold that said judgment was therefore virtually confessed by Brasfield in his own favor.

III.

This judgment thus confessed is fraudulent and void and should have been so held.

IV.

The Court erred in holding the judgment partly good and partly bad, and in approving to the extent of the valid notes the claim based upon said judgment, the judgment being a legal entirety. [93]

V.

The Court erred in ruling that the election of trustee which depended upon this claim was valid.

VI.

The Court erred in refusing to set aside the election of trustee and remanding the cause for a new election, at which a claim based upon the valid notes held by Woolfolk properly verified and filed should be permitted to vote in the amount of principal and accrued interest of the said notes and no more.

WHEREFORE it is prayed that the said order of the above-entitled court, in so far as it affirms the allowance of the claim of Woolfolk and the election

of trustee as had, be reversed.

WINFIELD R. SMITH,
Attorney for Trustee for the Purposes of This Appeal.

[Endorsed]: Assignments of Error. Filed U. S. District Court, Western District of Washington. Jun. 7, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy. [94]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, F. W. Hoffman and W. R. Prowell as principals, and the National Surety Company of New York, as surety, are held and firmly bound unto L. H. Woolfolk in the full and just sum of one thousand dollars (\$1,000), to be paid to him, his attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 12th June, 1913.

WHEREAS, lately in the above-entitled court in the above-entitled matter, an order was entered allowing the claim of L. H. Woolfolk in part and approving the allowance of said claim by the referee in bankruptcy except as to \$9,840.00, and the principals herein having obtained an appeal and filed a copy thereof in the clerk's office of said court to reverse the said order, and a citation directed to the said L. H. Woolfolk, citing and admonishing him to appear at a session of the United States Court of

Appeals for the Ninth Circuit, to be holden in the city of San Francisco, in said circuit, on the 6th day of October, 1913.

Now, the condition of the above obligation is such that if the said principals shall prosecute their appeal to effect and answer all damaged and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

F. W. HOFFMAN. [Seal]

W. R. PROWELL. [Seal]

Sealed and delivered in the presence of

W. HARR. [95]

NATIONAL SURETY COMPANY,

[Seal]

By EDW. M. ALLEN,

Attorney in Fact.

Approved by

EDWARD E. CUSHMAN,

U. S. Circuit Judge.

[Endorsed]: Bond on Appeal. Filed U. S. District Court, Western District of Washington. Jun. 16, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy. [96]

Citation on Appeal [Copy].

The United States of America,

Ninth Judicial Circuit,—ss.

The President of the United States to Lyman H. Woolfolk, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, held at the city of San Fran-

cisco in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein George B. Burke, trustee in bankruptcy for Wenatchee-Stratford Orchard Company, is appellant, and you are appellee, to show cause, if any there be, why the order in the said appeal mentioned should not be reversed in the respects specified and speedy justice should not be done to the parties in this behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 16th day of June, in the year of our Lord one thousand nine hundred and thirteen.

[Seal]

EDWARD E. CUSHMAN,
United States District Judge.

Service of the within citation and receipt of a copy thereof admitted this 18th day of June, 1913.

WALTER D. HARVEY,
Solicitor for Lyman H. Woolfolk, Appellee. [97]

[Endorsed]: Citation on Appeal. Filed U. S. District Court, Western District of Washington. Jul. 1, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy. [98]

Exhibit No. 1.

Hotel Oregon,
Portland, Oregon.
Wright-Dickinson
Hotel Co.,
Proprietors.

Hotel Seattle,
Seattle, Wash.
Wright and Dickinson
Hotel Co.,
Proprietors.

HOTEL OREGON,
Portland, Oregon,
February 24,
Nineteen 13.

Mr. F. W. Hoffman,
Wenatchee, Wash.

Dear Sir:

The bank has instituted suit for the collection of their note. Recent suits at Seattle against several orchard companies, and dissatisfaction on the part of some of our buyers may have caused the bank's uneasiness. I found it absolutely impossible to raise money by mortgage on the land, or in any other way.

Mr. Walter M. Harvey, attorney, Tacoma, can give you any further information you may desire.

Yours truly,

(Signed) G. M. BRASFIELD.

3/21/13 C. D. S. [99]

**Certificate of Clerk U. S. District Court to Transcript
of Record, etc.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States

District Court for the Western District of Washington, do hereby certify the foregoing and attached papers are a true and correct copy of the record and proceedings in the case of Wenatchee-Stratford Orchard Company, a corporation, Bankrupt, No. 1296, as required by the stipulation of counsel, filed in said cause, as the originals thereof appear on file in said court, at the city of Tacoma, in said District.

I do further certify that I hereto attach and herewith transmit the original Citation, and the original order extending time for record herein;

And I further certify the cost of preparing and certifying the foregoing record to be the sum of \$44.70, which sum has been paid to me by the attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the city of Tacoma, in said District, this tenth day of July, A. D. 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy Clerk. [100]

[Endorsed]: No. 2285. United States Circuit Court of Appeals for the Ninth Circuit. George B. Burke, as Trustee in Bankruptcy for the Wenatchee-Stratford Orchard Company, Appellant, vs. Lyman H. Woolfolk, Appellee. Transcript of Record. Upon Appeal from the United States District Court

for the Western District of Washington, Southern Division.

Filed July 14, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

In the Matter of WENATCHEE-STRATFORD
ORCHARD COMPANY,

Bankrupt.

Citation on Appeal [Original].

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States to Lyman H.
Woolfolk, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, held at the city of San Francisco, in the State of California, within thirty days from the date of this writ pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein George B. Burke, trustee in bankruptcy for the Wenatchee-Stratford Orchard Company, is appellant, and you are appellee, to show cause, if any there be, why the order in the said appeal mentioned should not be reversed in the respects specified and speedy justice should not be done to the parties in this behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 16th day of June, in the year of our Lord, one thousand nine hundred and thirteen.

[Seal]

EDWARD E. CUSHMAN,
United States District Judge.

Service of the within citation and receipt of a copy thereof admitted this 18th day of June, 1913.

WALTER M. HARVEY,
Solicitor for Lyman H. Woolfolk, Appellee.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Wenatchee-Stratford Orchard Company, Bankrupt. Citation on Appeal. Filed U. S. District Court, Western District of Washington. Jul. 1, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy.

No. 2285. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 14, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

**[Order Extending Time to July 28, 1913, to File
Record on Appeal.]**

*In the United States Circuit Court of Appeals for the
Ninth Judicial Circuit.*

No. 1296.

In re WENATCHEE-STRATFORD ORCHARD
COMPANY, a Corporation,
Bankrupt.

For good cause shown,

IT IS NOW ORDERED that the time within
which the record on appeal herein may be filed in this
court be, and the same is hereby, extending to and
including the 28th day of July, A. D. 1913.

Dated July 3d, 1913.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Filed U. S. District Court, Western
District of Washington. Jul. 5, 1913. Frank L.
Crosby, Clerk. F. M. Harshberger, Deputy.

No. 2285. United States Circuit Court of Appeals
for the Ninth Circuit. Filed Jul. 14, 1913. F. D.
Monckton, Clerk U. S. Circuit Court of Appeals for
the Ninth Circuit.

